No. 78-1742

In the Supreme Court of the United States

OCTOBER TERM, 1978

LOUIS WOLF,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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I.

OPINION BELOW

The opinion of the Supreme Court of Illinois, review of which is sought, is reported as *People* v. *Berland*, ... Ill. 2d ....., ... N.E.2d ....., ... and is set out in full in Appendix B. Petitioner was convicted in the Circuit Court of Cook County, Illinois after a bench trial of violating Section 20-1 (b) of the Criminal Code of 1961 (Ill. Rev. Stat. 1969, Ch. 38, Para. 20-1 (b)); he was sentenced to serve a term of one and one-half to four and one-half years in the Illinois State Penitentiary and fined $10,000.00. His conviction was originally reversed by the Illinois Appellate

Court, First District, Fourth Division, on August 11, 1977. *People* v. *Berland*, 52 Ill. App. 3d 96, (1st Dist. 1977). That opinion appears in Appendix A. The Supreme Court of Illinois heard the case on appeal by the state and ultimately reversed the Appellate Court in May 1978. The Illinois Supreme Court denied Louis Wolf's petition for rehearing on February 20, 1979, in an opinion which is recorded at ..... Ill. 2d ....., ... N.E. 2nd ..... (1978). This opinion is set out in Appendix C.

II.

JURISDICTION

The order of the Illinois Supreme Court was entered on February 20, 1979. This Court's jurisdiction is invoked under 28 U.S.C., §1257 (3). This Petition for a Writ of Certiorari is filed within 90 days of that order.

III.

QUESTIONS PRESENTED FOR REVIEW

1. Is a defendant's Sixth Amendment right to effective assistance of counsel violated where the trial court (though not requested to do so) fails to admonish jointly represented co-defendants about the possible conflicts inherent in dual representation and fails to inquire whether each defendant has voluntarily and with full knowledge of the consequences decided to accept such representation.

2. Must a defendant make a showing of an actual conflict of interest manifested at trial (and if so, to what extent) in order to prevail in a constitutional claim of ineffective assistance of counsel due to joint representation of co-defendants by a single attorney.

3. Whether a defendant's Fourteenth Amendment right to Due Process of law is violated when the prosecution intentionally misrepresents the identity of their key eye-

witness in a criminal prosecution in order to suppress the earlier inconsistent testimony which she gave at a related civil trial?

IV.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V.

THE MANNER IN WHICH THE FEDERAL CONSTITUTIONAL CLAIM WAS RAISED

Petitioner Wolf first raised his Sixth Amendment right to counsel in the Appellate Court of Illinois, First District, claiming that his attorney's joint representation of he and his co-defendant had deprived him of his right to effective assistance of counsel. The Appellate Court reversed Petitioner's conviction relying, in part, on the fact that he had

been deprived of his constitutional right of effective assistance of counsel. The Illinois Supreme Court, however, reversed the lower court's decision after an appeal by the State. Petitioner then filed a petition for rehearing, again asserting that his Sixth Amendment right to counsel had been violated; the Illinois Supreme Court denied this petition.

Petitioner initially raised his Fourteenth Amendment right to due process of law by making a specific request for *Brady* material from the State. This right was next asserted in a post-trial motion for acquittal in the trial court after the defendant discovered that the State had fraudulently suppressed exculpatory evidence. Petitioner then raised his claim in the Illinois Appellate Court, First District, which reversed his conviction. Subsequently, while the State's appeal of his acquittal was pending in the Illinois Supreme Court, Petitioner discovered additional evidence that the State had suppressed. As a result, he filed another post-trial motion for acquittal with the trial court, again asserting his right to due process of law. The trial court denied this motion. Petitioner then raised this issue with the Illinois Appellate Court, First District. This appeal was consolidated with the State's appeal in the Illinois Supreme Court. In its initial opinion, the Illinois Supreme Court did not address Petitioner's claims for relief on this issue. Ultimately, however, the Illinois Supreme Court denied Petitioner relief on these claims, in a supplemental opinion that it filed in regards to his request for a rehearing.

VI.

STATEMENT OF THE CASE

Petitioner Louis Wolf, along with Albert Berland, was indicted for arson of a building with intent to defraud an insurer. Both men were also charged with conspiracy to commit arson (the act in furtherance of the conspiracy allegedly being the setting of the fire by Wolf). In addition, Wolf, alone, was charged with arson to damage the property without the consent of the owner. The owner of the building in issue was Albert Berland.

The case was tried before the Circuit Court of Cook County, Illinois, without a jury. Count I of the indictment, which charged Louis Wolf alone with setting the fire, was dismissed at the close of the State's case. Count III of the indictment, which charged conspiracy, was found to be barred by the State statute of limitations. The trial court entered a judgment of guilty for both defendants with respect to Count II—arson with intent to defraud an insurer. The Illinois Appellate Court, First District, in a unanimous opinion, reversed this judgment. *People* v. *Berland,* 52 Ill. App. 3d 96. The Appellate Court based its reversal, in part, on the fact that joint representation of these defendants for most of the trial by one attorney and throughout the State's case had deprived each of them of their constitutional right to effective assistance of counsel. The Illinois Supreme Court reversed the lower court and reinstated these convictions. ..... Ill. 2d ....., ... N.E. 2d ..... A subsequent Petition for rehearing on behalf of Petitioner Wolf was also denied. ..... N.E. 2d .....

BACKGROUND

On November 19, 1969, at about 11:30 a.m., a fire occurred in a 12-unit, three-story apartment building at 715 South Lawndale in the City of Chicago. (R. 90, P.Ex. 11) [1] An

[1] References to Exhibits herein are as follows: People's Exhibits, "P. Ex. ....."; Defendants' Exhibits, "D.Ex. ....."; Exhibits to Motion of Defendant Wolf for New Trial, "Pet. Ex. .....", The State's Petition for Leave to Appeal is referred to as "S.Pet." R. ..... indicates a reference to the transcript of the trial; R.C. ..... indicates a reference to the common law record.

investigator from the Chicago Fire Department determined that the fire was caused by the ignition of a flammable liquid in a bathroom in one of the third-floor apartments. (R. 165-71). The fire was of limited extent.

The building was owned by Albert Berland through a title-holding procedure commonly known in Illinois as a land trust. (P. Ex. 5 at 63; P.Ex. 8 at 301-04). Berland had paid $18,000 for the building in 1966, and spent approximately $29,000 in repairs thereafter. (P. Ex. 5 at 4-9). In June, 1969, Berland applied for a $100,000 insurance policy on the property. (R. 63-64). In order to obtain full compensation for any partial damage to the building, Berland was required by the terms of his policy to insure the building for at least 80% of its "actual value"—replacement cost less depreciation. (R. 400-01).

Berland filed an insurance claim for the loss he had sustained in the fire, and, when the insurer refused to pay the claim, Berland brought an action against the insurer in the United States District Court for the Northern District of Illinois, in the name of his trustee bank. *Lawndale National Bank* v. *American Casualty Co.* No. 70 C 519 (N.D. Ill.) In defense of this lawsuit, attorneys for the insurer, principally Edwin McCarthy of Chicago, took depositions of Berland and Louis Wolf (P.Ex. 1-6) and interviewed witnesses to the fire[2] (R. 118-20, 148-50; R. C141-44). Agent Thomas Begg of the Illinois Bureau of Investigation interviewed witnesses in conjunction with Mr. McCarthy's trial preparation. (R. C129-36; C138-40; C141.) At trial, the insurance company attempted to show that

[2] Two of these witnesses, Albert Kyles and Evelyn Mayberry, a/k/a Elizabeth McGowan a/k/a Mrs. Roosevelt McGowan, were the key witnesses at the criminal trial of the Petitioner. Mayberry, it was later revealed, gave testimony at the civil trial that sharply conflicted with her testimony at the trial of the criminal case. *See* p. 10, *infra*.

(1) Berland's policy had been procured by a fraudulent application and (2) Wolf, acting on behalf of Berland, had set the fire. Both Berland (P.Ex. 7) and Wolf (P.Ex. 8) testified. A jury found in favor of the insurance company in a general verdict, but a new trial was ordered on appeal. The Court of Appeals held that the claim of a fraudulent application was insufficient in law, and that arson had not been conclusively proven. *Lawndale National Bank* v. *American Casualty Co.*, 489 F.2d 1384, 1389 (7th Cir. 1973).

On May 11, 1973, almost four years after the fire, the Grand Jury returned an indictment against the Petitioner and Albert Berland for their alleged role in the fire. The trial of their case took place in January of 1974. At trial, the State's case rested primarily on the testimony of two alleged eyewitnesses to the fire—Albert Kyles and Evelyn Mayberry. These two witnesses related conflicting stories regarding the time they allegedly saw the defendants entering the building in issue and the equipment these men had with them. In addition, both witnesses related a description of the Petitioner, who they asserted they saw enter the building just before the fire, that conflicted with his actual appearance at the time.[3] Interestingly, their description matched with a picture of the Petitioner which pre-dated the fire and which had been shown to them four years earlier by attorneys involved in defendant Berland's civil suit against the insurance company.

[3] During the years, 1964-1967, Petitioner Wolf was bald. In 1967, he received a hair transplant so that at the time of the fire, he had a full head of hair. Subsequently, that hair began to fall out and thus by the time of trial he was, once again, partially bald. (R. 468-69; 496-98). Kyles identified the Petitioner in court as the man that he had seen, but he appeared to have less hair at the time of the fire. (R. 112-13).

Petitioner Wolf offered alibi evidence that placed him in downtown Chicago at the time of the fire; three separate witnesses testified to that effect for the defense. (R. 118-120; 149-150) In addition, Petitioner Wolf, although admitting both his close friendship with Berland and that he had done some work for Berland at his property as a personal friend, offered uncontradicted testimony that he received no payments from Berland for any work that he did for him, and that he had no interest in the insurance policy or the building in issue. (R. 499-500; R. 465-467; P.Ex. 1 at 19-22).

As noted previously, the trial court entered a judgment of guilty on one of the three counts of the indictment against both of the defendants; the other counts had been dismissed.

CONFLICT OF INTEREST

On May 7, 1973, while the *Lawndale* case was awaiting decision on appeal, and approximately 3½ years after the fire at 715 South Lawndale, an indictment was returned against Berland and Wolf in connection with the fire. (R. C1-7) As noted previously the indictment was in three counts: Count I charged that Wolf, alone, had violated Ill. Rev. Stat. 1969, ch. 38, §20-1 (a) (arson or damage to property without consent of owner) (R. C4); Count II charged that both Wolf and Berland had violated Ill. Rev. Stat. 1969, ch. 38 §20-1 (b) (arson or damage to property with intent to defraud an insurer) (R. C5); Count III charged both Wolf and Berland with conspiracy to commit arson, in violation of Ill. Rev. Stat. 1969, ch. 38, §8.2 (Wolf was alleged to have set the fire in furtherance of this conspiracy) (R. C6).

On May 17, 1974, the defendants were arraigned. (R. C11) Clarence Dunagen appeared as counsel for both defendants. (R. C9-10). At no time during the arraignment, or in any of the subsequent proceedings, did the

Court inquire about the potential conflict of interest in Dunagen's representation of both Berland and Wolf, or advise the defendants about any potential impairment of their individual defenses that could occur as a result of their joint representation by counsel (R. C11-13).

On January 14, 1974, each defendant waived jury trial (R. C48-51). The trial began with both defendants still represented only by Dunagen (R. 1-33). At the beginning of trial, the State introduced the depositions and trial testimony of Berland and Wolf in the *Lawndale* case, without objection from Dunagen (R. 24).

The trial continued, after a one-day recess, on January 17, 1974. On this day, the State put on the bulk of its case (R. 34-185), calling all of its witnesses except an employee of the Cook County Clerk's office who testified about a search of records (R. 205-11). On this day, too, both defendants were represented only by Dunagen. Because Berland required hospitalization, the trial did not resume until January 23, on which date the State rested its case (R. 258). In the interim, Wolf obtained additional counsel, Jack G. Stein (R. 202). At the suggestion of the trial court, and after argument, the State then *nolle prossed* Count I of the indictment (R. 321). On January 24 and 25, the defense was presented (R. 322-512), and, after rebuttal and surrebuttal witnesses testified and closing arguments were made, the Court entered judgment against both defendants on Counts II and III (R. 609-616).

Additional and separate counsel appeared for each defendant to present post-trial motions (R. 617-20). Finding that conspiracy charges against defendants were barred by the statute of limitations, the Court granted a motion in arrest of judgment as to Count III (R. 889-92). However, the Court denied motions for new trial, which questioned the sufficiency of the evidence and the adequacy of

defendants' representation by counsel (R. 892-903). Each defendant was thereafter sentenced on Count II to serve a prison term of 1½ to 4½ years, and was fined $10,000 (R. 927).

BRADY ISSUE

Prior to trial, the defendants made a request for *Brady* material from the State. After the trial was completed, it was discovered that the State had suppressed the fact that Evelyn Mayberry also went under the names of Elizabeth McGowan and Mrs. Roosevelt McGowan. Indeed, the State not only failed to reveal this fact, it actually listed these two names as separate persons on the witness list it provided to the defense (R. 87-88). The significance of this cannot be appreciated without first knowing that at the civil trial (*Lawndale National Bank, supra*) Mayberry testified under the McGowan name and gave conflicting testimony to that which she gave at the criminal trial. Specifically, when insurance counsel asked Mayberry whether she was able to see the faces of the two men who went into the building on the day of the fire, she stated:

> A. No, they had their backs turned, their backs was to my window (Pet. Ex. 4 at 58).

When subsequently asked if she had, at any time, seen the faces of the men, she replied:

> "Not that day" (*Id.* at 58).

This was directly contrary to her testimony at the criminal trial.

In addition, Petitioner Wolf found that the State had suppressed various police reports; a fire department report which gave details regarding a one man picture show-up that had been conducted by the Illinois Bureau of Investigation and the law firm representing the insurance

company in *Lawndale National Bank, supra* (at that show-up Albert Kyles and Evelyn Mayberry were shown a police mug shot of Petitioner Wolf and asked if he was the man they had seen on the day of the fire); and, a list of other witnesses who the police had interviewed and who gave contradictory stories to that of Kyles and Mayberry.

As a result, Petitioner Wolf filed a writ of *coram nobis* with the trial court; this motion was denied. Petitioner Wolf appealed this ruling to the Appellate Court of Illinois, First District. Subsequently, other reports contrary to testimony of a fire official who testified that the fire had been caused by arson, also were discovered by Petitioner Wolf to have been suppressed. Again, he petitioned for relief from the trial court on the basis of this additional newly discovered exculpatory evidence. Once, again, the trial court denied Wolf's motion. This ruling was also appealed to the Appellate Court of Illinois, First District. Both of these appeals were later consolidated with the State's appeal in the Illinois Supreme Court of the Illinois Appellate Court's reversal of Wolf's conviction. The Illinois Supreme Court, while failing to address these issues in their original opinion, *See* ..... Ill. 2d ..... N.E. Ed. ..... denied Wolf's appeal in a supplemental opinion denying his Petition for Rehearing.

VII.

REASONS FOR ALLOWING THIS WRIT

A. TO ALLOW THIS COURT THE OPPORTUNITY TO RESOLVE THE FOLLOWING IMPORTANT CONSTITUTIONAL ISSUES, WHICH THIS COURT HAS STATED ARE RIPE FOR REVIEW, AND WHICH WERE EXPLICITLY LEFT OPEN IN HOLLOWAY v. ARKANSAS: WHETHER, UNDER THE SIXTH AMENDMENT, A TRIAL JUDGE, SUA SPONTE, MUST ADVISE CO-DEFENDANTS OF THE DANGERS OF JOINT REPRESENTATION IN THE ABSENCE OF NOTIFICATION OF ANY POTENTIAL CONFLICT OF INTEREST BETWEEN THEM, AND MAKE INQUIRY INTO THE POSSIBILITY OF ANY CONFLICT OF INTEREST; AND, WHAT DEGREE OF CONFLICT, IF ANY, IS NECESSARY IN A CASE OF JOINT REPRESENTATION OF CO-DEFENDANTS TO REQUIRE THE REVERSAL OF CONVICTIONS OF ONE ON THE GROUND THAT HE HAS BEEN DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

In *Holloway* v. *Arkansas*, 435 U.S. 475, this Court explicitly stated that the precise constitutional issues that are presented by the instant case remain unresolved at this time. Moreover, in *Holloway* it was clearly recognized that the circuits are divided in this area, and that these issues are ripe for review by this Court:

> [C]ourts have taken divergent approaches to two issues commonly raised in challenges to joint representation where—unlike this case—trial counsel did nothing to advise the trial court of the actuality or possibility of a conflict between his . . . . clients' interests. First, Appellate Courts have differed on

> how strong a showing of conflict must be made, or how certain the reviewing court must be that the asserted conflict existed, before it will conclude that the defendants were deprived of their right to the effective assistance of counsel. (Citations omitted). Second, courts have differed with respect to the scope and nature of the affirmative duty of the trial judge to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of conflicting interests. (Citations omitted).
>
> We need not resolve these two issues in this case, however. *Holloway* v. *Arkansas*, *supra* at 483-484.

In the case at bar, the exact questions this Court did not resolve in *Holloway* are at issue. Petitioner Wolf was charged in three separate counts of a State Grand Jury Indictment: Count I charged Wolf *alone* with knowingly damaging the property of another without his consent—the property in question was owned by his co-defendant, Berland; Count II charged Wolf and his co-defendant Berland with knowingly committing arson with intent to defraud an insurer and; Count III charged Wolf and his co-defendant Berland with conspiracy to commit arson. Both the Petitioner and his co-defendant were jointly represented by the same counsel from the pre-trial hearings up through the presentation of the State's case-in-chief.[1]

The inherent conflict between the Petitioner and his co-defendant was clear. As a result of Wolf being charged individually with committing arson to the building in question without Berland's consent, it was in Berland's best

[1] At that time, Wolf obtained additional counsel. In addition, at the end of the State's case, Count I of the indictment charging Wolf with damaging Berland's property without his consent, was dismissed.

interest to demonstrate that Wolf did indeed burn his building without either his knowledge or consent. From their joint counsel's point of view, if he were to cross-examine the State's eye-witness to the effect that they only saw Wolf at the scene of the incident, and not Berland, it would confer a benefit upon Berland while simultaneously incurring severe damage to Wolf's chances for acquittal. On the other hand, if he were to cross-examine such witnesses to the effect that Berland was at the building that day, he would automatically gain acquittal for Wolf on Count I of the indictment while doing severe damage to his other client's (Berland) ability to be found not guilty.

In addition, should trial counsel have pursued cross-examination of the State's eye-witnesses that, in fact, only Berland was present that day, he would have won acquittal for Petitioner Wolf on all three counts while simultaneously having shifted all of the blame, and of course, the criminal liability, onto his client Berland. The Illinois Appellate Court, in reversing Petitioner's conviction, relied, in part, on the grounds that he was denied his constitutional right to effective assistance of counsel, stating that the nature of the indictment *alone* would "make it impossible for a single attorney to represent both defendants." *People* v. *Berland*, 52 Ill. App. 3d 96, 100 (First District, Fourth Division 1977).

Despite the obvious conflict of interest that joint representation created for their attorney, the trial judge neither conducted an inquiry regarding the severity of such a conflict, nor advised the co-defendants of the implications that such representation could have on their ability to obtain adequate assistance of counsel in the defense of their individual cases. That the trial judge instantly should have

realized the inherent conflict between these co-defendants is obvious:

> In the case at bar, the trial judge should have perceived at the outset of the trial [that] there existed the possibility of defenses for the defendants which of necessity would be in conflict. *People* v. *Berland*, *supra* at 100-01.

Admittedly, in this case, "trial counsel did nothing to advise the trial court of the actuality or possibility of a conflict between his . . . . client's interests." *Holloway* v. *Arkansas*, *supra* at 483. Yet, this is the precise point at issue in cases such as this. Does a trial judge have a duty under the Sixth Amendment to determine if a serious conflict of interest is created by the joint representation of co-defendants at a criminal trial? Moreover, in cases where, as here, the conflict is so apparent, does not the trial judge have a duty to alert co-defendants to the possibility that their joint representation might result in a serious impairment of their Sixth Amendment right to effective assistance of counsel at trial.[5]

Furthermore, another serious question that is raised in this area is, assuming that the trial judge fails to impart such warnings to the defendant, then, what degree of prejudice must the defendant demonstrate in order to show that his Sixth Amendment rights have been violated? In those jurisdictions that require such warnings, failure of the judge to adequately alert the defendant to the dangers of joint representation is *per se* violative of the Sixth Amendment. *United States* v. *Waldman*, 579 F.2d 649, 651 (1st Cir.

[5] It would seem that such inquiries by the trial court especially are required in cases where, as here, there are serious allegations that are substantiated by the record that the codefendant's trial counsel was in fact incompetent.

1978).[6] *See United States* v. *Alvarez*, 580 F.2d 1251, 1259-60 (5th Cir. 1978); *United States* v. *Levy*, 577 F.2d 200, 211 (3rd Cir. 1978); *see also* ABA, Standards Relating to the Administration of Justice—Function of the Trial Judge Section 3.4 (b) at 171 (1974).

In those jurisdictions that do not require such warnings by the trial judge, the standards for showing a constitutional violation as a result of joint representation varies. *See, eg. Smith* v. *Regan*, 583 F.2d (2nd Cir. 1978); *United States* v. *Mandell*, 525 F.2d 671, 677 (7th Cir. 1975). In *Holloway, supra*, this Court decided that it was per se violative of a defendant's Sixth Amendment rights for a trial court to require joint representation over objection by trial counsel. Thus the questions left open for this Court, and which are presented in the present case, are as follows:

1. Is it a *per se* violation of the Sixth Amendment for a trial judge to permit joint representation to continue when he has failed to make an inquiry into the possibility of a conflict between co-defendants, or has failed to advise such defendants of the dangers of such a conflict?

2. Alternatively, what degree of conflict, and what degree of prejudice arising from that conflict, must the defendant demonstrate before a constitutional violation will be found?

[6] In *Waldman*, the Court, *quoting* from *United States* v. *Foster*, 469 F.2d 1 (1st Cir. 1972), stated:

> [I]t shall be the duty of the trial court, as early in the litigation as practicable, to comment on some of the risks confronted where defendants are jointly represented to ensure that defendants are aware of such risks, and inquire diligently whether they have discussed the risks with their attorney, and whether they understand that they may retain separate counsel appointed by the Court and paid for by the Government.

The Court went on to state that trial judges should advise defendants that "it [is] possible with respect to particular defenses and particular decisions—such as whether or not to take the stand, or to call particular witnesses, or to ask particular questions on cross-examination—that what [is] in one defendant's best interest would turn out not to be in the others." *United States* v. *Waldman, supra* at 652 n.4 *quoting United States* v. *Donahue*, 560 F.2d 1039, 1043-44 (1st Cir. 1977). In the instant case, the Illinois Supreme Court rejected this precise approach. *People* v. *Berland*, ... Ill. 2d ....., ... N.E. 2d ..... (1978).

The importance of these questions has already been recognized by this Court. The difficulty in promulgating a clear standard for the resolution of these questions is demonstrated by the conflict that exists in the varying jurisdictions. For these reasons, Petitioner urges this Court to grant Certiorari in the case to answer these important Constitutional questions.

B. TO DETERMINE WHETHER INTENTIONAL MISREPRESENTATION OF EVIDENCE BY A PROSECUTOR THAT RESULTS IN SUPPRESSION OF CRITICAL IMPEACHMENT EVIDENCE OF AN EYEWITNESS FALLS WITHIN THE PURVIEW OF THIS COURT'S MANDATE IN BRADY v. MARYLAND AND UNITED STATES v. AGURS.

In *Brady* v. *Maryland*, 373 U.S. 83, this Court held that a prosecutor's suppression of evidence "material to a defendant's guilt or innocence" is violative of due process. Subsequently, in *United States* v. *Agurs*, 427 U.S. 97, clear standards were set forth regarding the degree of "materiality" that was necessary for the suppression of such evidence to require reversal of a defendant's conviction. Both *Brady* and *Agurs* involved cases of complete suppression of evidence by the prosecution until after trial. Consequently, whether a prosecutor's misrepresentation of evidence that resulted in the effective suppression of evidence was left open in these decisions. The instant case

involves just such a situation and is thereby ripe for review by this Court.

In the case at bar, the Petitioner Wolf was convicted of arson with intent to defraud an insurer. The gist of the incriminating evidence which led to the conviction of the Petitioner was the testimony of an eyewitness, Evelyn Mayberry, who stated that she saw the Petitioner drive up in front of the building in question with another man in a station wagon (R. 135-136). Mayberry further stated that the Petitioner then got out of the car, removed a silver-colored gas can from the back of the station wagon, and then went into the building with the other man (R. 137-139). Mayberry's identification of the Petitioner was based, in part, on the fact that she had seen him on three other occasions at the building in the three days previous to the fire (R. 140-143).

The impact of a positive identification of a defendant at the scene of a crime with the instrumentality of the crime in his hand is obvious. Thus, it would have been critical to the ultimate verdict in this case had the defense been able to impeach Mayberry's testimony. At trial, however, the defense was unaware of any contradictory statements that had been made by Mayberry. Yet, in fact, highly contradictory statements had been made by Mayberry—*under a different name*. Mayberry, at the related civil trial, gave testimony that was completely contradictory to her testimony at the criminal trial.[7] Mayberry testified at that trial,

[7] In her testimony at the civil trial, in direct contrast to what she stated at the criminal trial, Mayberry testified that she never saw the face of the man she later identified as Wolf. Referring to the date of the fire, insurance counsel asked Mayberry whether she was able to see the faces of the two men and Mayberry replied that she could not see their faces because they had their backs to her window. The critical value of this impeaching evidence cannot be understated; clearly it undercuts Mayberry's identification of Wolf at the scene of the fire on the day in question.

however, under the name of Elizabeth McGowan. Thus, after Mayberry testified at the criminal trial under the name of Evelyn Mayberry, the defense, not knowing she was the same individual as Elizabeth McGowan, could not impeach her with her prior inconsistent testimony.

That Mayberry's true identity was suppressed, although deplorable prosecutorial conduct, is not the critical issue here. The unique issue here, and the one upon which this Court has yet to rule, arises out of the fact that the prosecutor intentionally misrepresented the Mayberry/McGowan identity by listing Evelyn Mayberry and Elizabeth McGowan as different people on the witness list which they supplied to the defendants. The prosecution's rationale in doing this was clear: to prevent the defense from discovering that McGowan and Mayberry were the same individual and thus prevent the defense from impeaching Mayberry with her prior inconsistent testimony at the civil trial.

This Court consistently has held that the knowing use of perjured testimony by the prosecution is fundamentally unfair and constitutes grounds for reversal. *Miller* v. *Pate*, 386 U.S. 1; *Napue* v. *Illinois*, 360 U.S. 264; *Pyle* v. *Kansas*, 317 U.S. 213. In those cases this Court vigorously attacked the type of outrageous prosecutorial behavior that is presented by the facts of this case. Moreover, in *Agurs*, this Court stated that *Brady* clearly applies to situations where the prosecution *suppresses* evidence which demonstrated that the prosecution's case contained perjured testimony. *United States* v. *Agurs supra* at 103.

The instant case is extremely similar to the type of case which this Court was referring to in *Agurs*, with one critical exception: here the prosecution did not merely sup-

press material exculpatory evidence, but it intentionally *misrepresented* such evidence with the same results. In view of this Court's previously noted abhorrence to such outrageous prosecutorial gamemanship, and the mockery that such actions make of the principles of *Brady*, and in light of the fact that this Court has yet to rule on this new type of suppression of evidence, Petitioner urges that Certiorari be granted in this case.

CONCLUSION

For the reasons set out above, Petitioner respectfully submits that the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

ALBERT BERLAND (Impleaded) *et al.*,
Defendants-Appellants.

First District (4th Division) No. 60932

Judgments reversed.

Opinion filed August 11, 1977.

Mr. PRESIDING JUSTICE DIERINGER delivered the opinion of the court:

This is an appeal from the circuit court of Cook County. The defendants were convicted after a bench trial of violating section 20—1(b) of the Criminal Code of 1961 (Ill. Rev. Stat. 1969, ch. 38, par. 20—1(b). Section 20—1(b) provides: "A person commits arson when, by means of fire or explosive, he knowingly: * * * [w]ith intent to defraud an insurer, damages any property or any personal property having a value of $150 or more." Both defendants were sentenced to terms of 1½ to 4½ years in the Illinois State Penitentiary and fined $10,000.

Although both defendants were represented in the trial court by the same attorney, they have each retained separate counsel for the purposes of this appeal. Accordingly, we shall treat each of their appeals individually, as they both raise distinct questions for review.

Defendant Wolf raises six questions for review. (1) whether or not he was denied effective assistance of counsel

by the incompetence of his trial counsel and the dual representation of himself and his co-defendant by the same counsel; (2) whether or not the State failed to prove beyond a reasonable doubt he had the "intent to defraud an insurer"; (3) whether or not there was sufficient evidence to prove the guilt of the defendant where there was no adequate and credible identification of the defendant; (4) whether or not the defendant was denied his due process rights by the failure of the State to disclose the "dual identity" of a key State's witness; (5) whether or not the trial court erred in admitting as substantive evidence prior statements of a nontestifying co-defendant; (6) whether or not the State failed to prove the corporate existence of the company alleged to have been defrauded. Defendant Berland adopts these issues insofar as they are applicable to him and raises two additional questions for review: (1) whether or not his trial counsel had a conflict of interest in that he was representing a co-defendant who was charged with the commission of a felony against the interests of Berland, whether or not his trial counsel was incompetent in failing to ask the trial judge to limit his consideration of statements made by each defendant to that defendant, failing to impeach a principal State's witness, failing to contradict the other principal State's witness concerning his presence at the scene, and failing to introduce evidence to explain the insuring of the building; (2) whether or not the defendant was proven guilty beyond a reasonable doubt.

Since both of the convictions arose out of the same occurrence, one statement of facts will suffice for both defendants. On June 30, 1969, the Illinois Fair Plan Association received an application for insurance covering the building at 715 South Lawndale, Chicago, Illinois, from Albert Berland, the owner. Insurance coverage in the

amount of $100,000 was issued on August 13, 1969, by the American Casualty Company. On November 19, 1969, the building at 715 South Lawndale burned. By the testimony of Chicago Fire Department investigators, it is apparent the cause of the fire was arson. On May 11, 1973, almost four years later, the grand jury returned a two-count indictment against Albert Berland for the offenses of arson with the intent to defraud an insurer, and conspiracy to commit arson. Defendant Wolf was charged in another indictment with the offenses of arson, in that he burned a building without the owner's consent, arson with the intent to defraud an insurer, and conspiracy to commit arson. The defendants were tried jointly in a bench trial and were found guilty of arson with the intent to defraud an insurer and of conspiracy to commit arson. The charge of arson, burning a building without the owner's consent, against defendant Wolf was nolle prossed during the trial. A post-trial motion in arrest of judgment on the count of conspiracy to commit arson for both defendants was allowed. Judgment on the finding of guilty on the charge of arson with the intent to defraud an insurer was entered.

The testimony for the State at trial rested primarily on two alleged eyewitnesses to the fire. The trial took place in January of 1974, so the eyewitnesses were testifying to occurrences which took place more than four years previously. The first eyewitness to testify was Albert Kyles. He identified Wolf as the man he saw carrying a "red" gasoline can into the building on the date of the fire. He also testified he was very unsure about the time of day it was when he saw the defendant. The witness had seen the defendant in the building previously and claimed to have paid the defendant rent for an aunt who lived at one time in the building. The witness could not be sure whether or not it was one year before the fire or several years

before the fire, when he had seen the defendant. Neither could he remember when it was that his aunt moved in or when it was that his aunt moved out of the building.

The second eyewitness for the State was Evelyn Mayberry, also known as Elizabeth McGowan, also known as Mrs. Roosevelt McGowan. Ms. Mayberry, as we shall refer to her, testified she saw defendant Wolf enter the building with a "silver" gas can. Ms. Mayberry also testified the locks on the doors of the building had all been removed and the door she saw defendant Wolf enter was unlocked and open. The first fireman on the scene testified the door to the building was secured with a padlock. Ms. Mayberry had previously testified, under the name of Mrs. Roosevelt McGowan, in a civil suit arising out of the same fire, in the United States District Court, Northern District of Illinois, Eastern Division, Case Number 70 C 519. In the Federal court, Ms. Mayberry testified she never, at any time, saw the faces of the men who went into the building.

In addition to the questionable testimony of these two witnesses, the State offered a great deal of documentary evidence. Immediately upon the commencement of the trial, the State offered into evidence eight transcripts of depositions and testimony of the two defendants which had been given in connection with the suit in Federal court. These transcripts, as the State admitted in the trial court, went "far beyond that of what we are concerned with." The trial judge ruled he would only consider the evidence of other or prior fires according to the guidelines established in *People* v. *Bishop* (1934), 359 Ill. 112. The judge stated his understanding of this case as being "there must be some kind of link-up between the offense in question and the prior offense." Besides the voluminous transcripts offered by the State, they also offered into evidence certain files from housing court concerning a number of buildings

which had numerous building code violations. Some of these buildings were owned by one of the defendants, some by another, and most of them by neither of the defendants. These exhibits were: 65 Ch 3915, 3434-36-42 West 15th St. and 1448 South Trumbell, owned by Irving Berland; 66 Ch. 5026, 3351 West Dounglas Blvd., owned by Irving Koppel; 66 Ch 6858, 715-17 South Lawndale, owned by Julius Leher and William Berke; 67 Ch 842, 1542 South Kedzie, owned by Zelmond Greay; 68 Ch 50081, 4025 West Monroe, owned by Fred Cooper; 68 Ch. 53352, 715-523 South Lawndale, owned by Fred Cooper; 70 Ch 52442, 918 South Springfield, owned by Albert Berland and Robert Watson; 70 Ch 50409, 2248 West Division, owned by Federal Savings and Loan Insurance Corporation, A. E. Berland Real Estate, and Joseph Murro. Defense counsel objected to the introduction of all of these documents.

•1 We shall first consider the contentions of defendant Wolf. The first issue presented for review is the defendant was denied the effective assistance of counsel, due both to the incompetence of trial counsel and the dual representation of both Wolf and his co-defendant Berland. We note at the beginning of trial, defendant Wolf was charged with burning the building of his co-defendant, without the knowledge of the co-defendant. This alone would make it impossible for a single attorney to represent both defendants. The leading United States Supreme Court case in this area is *Glasser* v. *United States* (1942), 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457. In *Glasser* the court stated:

> "This is significant in relation to Glasser's contention that he was deprived of the assistance of counsel contrary to the Sixth Amendment. In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised

between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." 315 U.S. 60, 67, 86 L. Ed. 680, 698, 62 S. Ct. 457.

The Illinois Supreme Court in the case of *People* v. *Stoval* (1968), 40 Ill. 2d 109, 113, stated:

"There is no showing that the attorney did not conduct the defense of the accused with diligence and resoluteness, but we believe that sound policy disfavors the representation of an accused, especially when counsel is appointed, by an attorney with possible conflict of interests. It is unfair to the accused, for who can determine whether his representation was affected, at least, subliminally, by the conflict. Too, it places an additional burden on counsel, however conscientious, and exposes him unnecessarily to later charges that his representation was not completely faithful. In a case involving such a conflict there is no necessity for the defendant to show actual prejudice. *Glasser* v. *United States,* 315 U.S. 60; *Goodson* v. *Peyton,* (4th cir.), 351 F.2d 905."

In the case at bar, the trial judge should have perceived at the outset of the trial, there existed the possibility of defenses for the defendants which of necessity would be in conflict. As was said in the case of *United States ex rel. Miller* v. *Myers* (E. D. Pa. 1966), 253 F. Supp. 55:

"His right to counsel under the Constitution is more than a formality, and to allow him to be represented by an attorney with such conflicting interests as existed here without his knowledgeable consent is little better than allowing him no lawyer at all. See *Gideon*

v. *Wainright,* 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). This situation is too fraught with the danger of prejudice which the cold record might not indicate, that the mere existence of the conflict is sufficient to constitute a violation of relator's rights whether or not it in fact influences the attorney or the outcome of the case." 253 F. Supp. 55, 57.

• 2, 3 The next issue of defendant Wolf we will consider is whether or not the evidence was sufficient to prove Wolf guilty beyond a reasonable doubt on count two of the indictment, arson with the intent to defraud an insurer, the only count upon which the verdict now stands. The main evidence against the defendant consists of the testimony of the two alleged eyewitnesses and the mass of documents entered into evidence by the State. We will consider the documentary evidence first. The State offered the files from housing court "to demonstrate common scheme, design, and plan on other buildings aside from the one in question." These files concerned a number of other buildings, owned by a number of different people. Examining the actual documents which are in the file, we have found not only is there no link-up to the defendants, and therefore no probative value in the instant case, but many of the complaints were in fact for trivial matters such as garbage collection, putting screens on windows, and other matters which are completely unrelated to the issues of the trial. We feel these exhibits were improperly allowed into evidence and they have improperly influenced the trial judge against the defendants. It was error for the trial judge to consider these exhibits, as they have no relationship to the instant case. As regards the testimony of the two alleged eyewitnesses, they both claim they saw a virtually bald man enter the building carrying a gasoline can. Defendant Wolf was bald from 1964 to 1967. The witnesses

were shown a photograph of Wolf taken at this time. However, Wolf underwent a series of hair transplants in 1967 and 1968 and had more hair on the date in question than he did at the time of the trial. Both Kyles and Ms. Mayberry contradict each other as to the time they saw Wolf enter the building. Ms. Mayberry testified in the Federal civil suit she could not see the faces of the men who entered the building. Here, four years later, she claims to be able to identify defendant Wolf. Furthermore, Ms. Mayberry appears in this case under three different names: Evelyn Mayberry, Elizabeth McGowan, and Mrs. Roosevelt McGowan. The Evelyn Mayberry who testified at trial is the same person as the Elizabeth McGowan who testified in the Federal civil suit that it would be impossible for her to identify the men she said she saw going into the building on the date in question. This is also the same person who appears in the fire investigators' reports as Mrs. Roosevelt McGowan, wherein she also stated she could not identify the men who entered the building. The State should have known these aliases all referred to the same person, however, on the State's list of possible witnesses tendered to the defense before trial, the State listed both Evelyn Mayberry and Elizabeth McGowan as possible witnesses for the prosecution. The State failed to reveal her alias identity to defense counsel and it was only after trial defense counsel realized she was the same woman who appeared in the Federal civil suit with a completely different version of the events on the day in question. The creditability of this witness for the prosecution is highly suspect and the concealment of her dual identity by the State is a questionable prosecutorial practice. This was brought to the court's attention on a post-trial motion, to no avail.

In addition, Wolf presented three witnesses who testified he was downtown with them discussing a business proposition at the time the State's witnesses claim to have seen

him enter the building. One of these witnesses for Wolf was an attorney. In the case of *People* v. *Gardner* (1966), 35 Ill. 2d 564, our supreme court said:

> "The defendant contends that his guilt was not proved beyond a reasonable doubt and we agree. The basic conflict in the evidence is between the strength of the identification testimony and the strength of the alibi. Nothing except the identification by the victim and defendant's proximity to the victim's apartment connected defendant with the crime. This court has often held that: 'In a criminal case it is incumbent upon the prosecution to prove beyond a reasonable doubt not only the commission of the crime charged but also its perpetration by the accused. * * * And while the identification and whereabouts of the defendant at the time of the crime are questions for the jury, yet, where from the entire record there is a reasonable doubt as to the guilt of the accused, a judgment of conviction will not be permitted to stand. (*People* v. *Ricili*, 400 Ill. 309; *People* v. *Gold*, 361 Ill. 23.) Where the conviction of a defendant rests upon identification which is doubtful, vague and uncertain, and which does not produce an abiding conviction of guilt, it will be reversed. (*People* v. *Fiorita*, 339 Ill. 78; *People* v. *Kidd*, 410 Ill. 271.) Neither can we disregard the evidence of alibi where the sole and only evidence contradicting it rests upon the identity of the defendant as the man who committed the crime. *People* v. *Peck*, 358 Ill. 642; *People* v. *DeSuno*, 354 Ill. 387.' *People* v. *McGee*, 21 Ill. 2d 440, 444." (35 Ill. 2d 564, 571.)

In view of the firm language of our supreme court in these eight cases, we feel the decision of the court in *People* v. *Gardner* (1966), 35 Ill. 2d 564, is controlling. In the instant case we think the State did not prove the guilt of

the defendant beyond a reasonable doubt and accordingly reverse the conviction of defendant Wolf for arson with the intent to defraud an insurer. Having reached this conclusion, we need not consider any of the other points raised by the defendant.

Next we shall consider the issues raised by defendant Berland. The opinion of this court with respect to the first contention raised by the defendant, that he was denied the effective assistance of counsel, has been thoroughly discussed above, with respect to defendant Wolf, and the same applies to defendant Berland, and need not be repeated here. This court feels there was a conflict of interest on the part of trial counsel and it was incumbent on the trial court to raise the issue with respect to both defendants. It should have been clear to the trial court the conflict prevented either defendant from receiving a fair trial.

Defendant Berland's second contention is the State failed to prove him guilty beyond a reasonable doubt. The State argues "they were in a scheme together." The State also makes the flat statement in its brief: "There is absolutely no reason that can be inferred from any testimony as to why Wolf would burn the building without Berland's consent." In fact, the State's entire case against defendant Berland consists of one inference based upon another inference, drawn from a third inference. The first inference is the fact the two men had been friends for some 30 to 35 years. This court feels the need to point out there is nothing inherently criminal in such a situation. The next inference is the fact the two men had invested in various real estate and non-real-estate ventures over a number of years. There is, however, no contention by the State Wolf had any interest in the building in question. The next inference is Wolf was a customer of Berland, buying paint and other supplies from him and, in turn, Berland used Wolf's em-

ployees to make repairs in other buildings. That has no bearing on this case. The State makes much of the fact Berland used Wolf as a nominee when he bought the building in order to receive a broker's commission and reduce the actual price he would have to pay to acquire the building. Again, the inference is there is something sinister about the transaction. There is nothing wrong or criminal about such a situation, as it is a very common one in the real estate field. The State produced no direct evidence against Berland except he owned the building, which he readily admitted. There is no evidence of Berland's either burning the building or of his aiding, abetting, or somehow furthering the burning of his building, and, as the State admits, there is no reason why Wolf would burn the building on his own. The State's entire case against Berland is based on these inferences of normal, legal activity. It is well settled in Illinois you may obtain a conviction in Illinois based solely on circumstantial evidence; however, as the supreme court said in the case of *People* v. *Wilson* (1948), 400 Ill. 461, 473:

> "In cases where the proof is entirely circumstantial, if there is any reasonable hypothesis arising from the evidence, consistent with the innocence of the defendant, it must be adopted. It is essential to a conviction upon circumstantial evidence that the facts proved be not only consistent with the defendant's guilt, but that they be inconsistent, upon any reasonable hypothesis, with his innocence. *People* v. *Holtz,* 294 Ill. 143."

In a case similar to the instant case, the United States Court of Appeals discussed the function of a reviewing court in dealing with cases where the proof is entirely circumstantial in nature. In the case of *United States* v. *Litberg* (7th Cir. 1949), 175 F.2d 20, the court said:

"The principal contention before this court, urged with vigor and apparent sincerity, is that the evidence is not sufficient to support the judgment. Such a contention, where the proof in support of an essential element of the crime is doubtful and particularly where it depends upon inferences drawn from circumstances in proof, presents a difficult and perplexing problem for a court of review. On the one hand, we must keep in mind that oft repeated rule that the weight and credibility to be attached to testimony of the witnesses is a matter for the trier of the facts and that we are required to take that view of the evidence most favorable to the government. On the other hand, while the trier of the facts is entitled to draw all reasonable inferences from the circumstances in proof, a court of review is charged with the responsibility of determining the reasonableness of such inferences. In other words, an inference may not properly be relied upon in support of an essential allegation if an opposite inference may be drawn with equal consistency from the circumstances in proof. In *United States* v. *Tatcher,* 3 Cir., 131 F.2d 1002, 1003, the court reversing a conviction based on inferences states: 'To justify conviction of crime where the evidence relied upon is circumstantial in nature the evidence must be such as to exclude every reasonable hypothesis but that of guilt. *United States* v. *Russo,* 3 Cir., 1941, 123 F.2d 420. As we have seen, the evidence relied upon to sustain the defendant's conviction is as consistent with his innocence as with his guilt.'

In *United States* v. *Russo,* 3 Cir., 123 F.2d 420, 423, where knowledge was an essential element of the offense charged, it was held a judgment could not be sustained where the inference of lack of knowledge was

as readily deducible as that of knowledge. See also *Isbell* v. *United States,* 8 Cir., 227 F. 788, 792; *Pierce* v. *United States,* 6 Cir. 115 F.2d 399, 400; *Hammond* v. *United States,* 75 U.S. App. D.C. 395, 127 F.2d 752, 753." 175 F.2d 20, 21-22.

•4 In the instant case the trial court specifically found, by granting the motion in arrest of judgment on the conspiracy count, Berland had not conspired with anyone to burn the building. We have examined the record in its totality, some 700 pages of transcript from the trial alone, and can find no evidence to connect the defendant with the burning of this building. The State did not meet its burden of proving the defendant guilty beyond a reasonable doubt. Following the cases cited by our supreme court, as well as the Federal cases cited, we must conclude from the evidence introduced in the trial court there is a reasonable hypothesis from the inferences produced by the State and the evidence is consistent with the defendant's innocence. It is clear the State did not prove defendant Berland guilty beyond a reasonable doubt of arson with the intent to defraud an insurer. Accordingly, the judgment of the circuit court is reversed as to Berland.

Both judgments are reversed.

JOHNSON and LINN, JJ., concur.

APPENDIX B

Docket Nos. 50012, 50534 cons.—Agenda 7—May 1978.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant, v. ALBERT BERLAND *et al.*, Appellees.

MR. JUSTICE KLUCZYNSKI delivered the opinion of the court:

Defendants, Louis Wolf and Albert Berland, were convicted of arson with intent to defraud an insurer (Ill. Rev. Stat. 1969, ch. 38, par. 20-1(b)) after a joint bench trial in the circuit court of Cook County. Both were sentenced to terms of 1½ to 4½ years in the Illinois State Penitentiary and fined $10,000. The appellate court reversed the convictions on two grounds: that the single, retained counsel could not effectively represent the conflicting interests of the two defendants and that there was insufficient evidence of guilt to sustain the convictions. (52 Ill. App. 3d 96.) We granted the State's petition for leave to appeal under our Rule 315 (65 Ill. 2d R. 315).

On November 19, 1969, a fire occurred in a 12-unit, three-story apartment building at 715 South Lawndale in Chicago, Illinois, owned by Berland through a land trust at the Lawndale National Bank. Firemen arrived at the scene at 11:15 or 11:30 a.m., and the fire was extinguished by about 12:30 p.m. An arson investigator from the Chicago Fire Department determined that the fire had been set. It had started when an accelerant was poured onto the floor in the bathroom or in the area between the bathroom and living room in a third-floor apartment and ignited.

Berland, through the Lawndale National Bank as trustee, initiated suit against the insurer of the building in the United States district court to recover $35,000 under the

fire insurance policy. The insurance company interposed as defenses that Berland had misrepresented his fire-loss history in the insurance application and that the fire was the result of arson. The jury returned a general verdict in favor of the insurance company. The court of appeals reversed on the ground that the misrepresentations in the application were not a defense to the policy since the application was not incorporated in or attached to it. A new trial was required because the general verdict precluded determining whether the jury had accepted the misrepresentation or arson defense, and the court refused to accept the arson defense as a matter of law. *Lawndale National Bank* v. *American Casualty Co.* (7th Cir. 1973), 489 F.2d 1384.

An Illinois grand jury returned indictments against Wolf and Berland on May 11, 1973, about 3½ years after the fire, while the civil case was pending on appeal in Federal court. Count I charged Wolf alone with knowingly damaging the real property of another without his consent under section 20-1(a) of the Criminal Code of 1961 (Ill. Rev. Stat. 1969, ch. 38, par. 20-1(a)). Count II charged Wolf and Berland together with knowingly damaging a building by means of fire with intent to defraud an insurer (Ill. Rev. Stat. 1969, ch. 38, par. 20-1(b)). Count III charged both defendants with conspiracy to commit arson (Ill. Rev. Stat. 1969, ch. 38, par. 8-2).

A single, retained attorney entered his appearance on behalf of both defendants. Each defendant waived jury trial on January 14, 1974. Both defendants pleaded not guilty. Berland did not testify. Wolf denied he was present at the time of the fire. During the presentation of the State's case, attorney Jack G. Stein entered his appearance as additional co-counsel for defendant Wolf. Thereafter, at the conclusion of the People's case, count I, charging Wolf

with the burning of the building without the owner's consent, was nol-prossed. Additional and separate counsel for each defendant appeared to present post-trial motions. A post-trial motion in arrest of judgment on the conspiracy count for both defendants was allowed on the grounds that the statute of limitations on that count had run (Ill. Rev. Stat. 1969, ch. 38, par. 3—5(b)). Judgment on the finding of guilty on the charge of arson with intent to defraud an insurer was entered.

The State introduced transcripts of depositions and testimony of Wolf and Berland from the civil case in Federal court. They were admitted pursuant to a stipulation but subject to a defense objection to references to prior fires. The trial judge correctly ruled he would consider the prior fires only if there was no remoteness and if there was a linkup between the offense in question and the prior fires, in accord with *People* v. *Bishop* (1934), 359 Ill. 112, 119-20.

The trial court also admitted into evidence a series of housing court files concerning properties found to be in violation of the Chicago housing code (Municipal Code of Chicago, ch. 78). They were admitted for the limited purpose of showing prior business relationships between Wolf and Berland in the subject and other properties, not to show prior fires. The files themselves or the testimony of Wolf and Berland in the transcripts from the Federal proceedings indicated that the properties belonged either to one of the defendants, his nominees or aliases, or those whose addresses were businesses owned by Wolf.

In 1966 defendant Wolf had negotiated the purchase of the building at 715 South Lawndale for Berland. Berland had introduced Wolf to the seller as the prospective purchaser and identified himself as the broker. Wolf

purchased the property in his name and transferred it to Berland as his nominee. Title was placed in a land trust established by Berland. At one point Wolf's nephew was given an interest in the property as collateral for a loan by Wolf to Berland. The interest was returned to Berland when the loan was paid. "Fred Cooper," an alias used by Berland, was listed as the beneficiary of the land trust at one time. The addresses given for "Fred Cooper" were two of Wolf's business addresses.

Wolf helped manage the property by selecting tenants and collecting rent. He was frequently present in the vicinity of the building. Wolf examined its physical condition, ordered coal for it, and referred contractors to Berland.

In June 1969 Berland applied for fire insurance on the property. The application was purportedly notarized at Wolf's office by Maurice Blumenthal on June 20, 1969. Blumenthal had died in a car accident in September of 1968, and the date noted for the expiration of his notary's commission was in error. The application contained a false, negative answer to a question requesting "the applicant's 5 year loss record for fire." Insurance coverage in the amount of $100,000 was issued on August 13, 1969, by the American Casualty Company. Berland introduced testimony that under the policy he was required to insure the building for $100,000; that was 80% of the "actual cash value" of the structure, which is measured by replacement cost less depreciation of up to 50% of that cost rather than by market value or purchase price. Berland paid $18,000 for the building and spent approximately $29,000 on repairs.

Prior to the fire the building was two-thirds vacant. Rent revenues had fallen from $650 per month to $250

per month. The building had been cited for 35 violations of the Municipal Code of Chicago. The building was losing money, and Berland had tried to sell it on contract on three occasions. The purchasers reneged.

Albert Kyles was across the street from 715 South Lawndale on the morning of the fire. He observed two white men drive up to the building in a dark station wagon at around 9 or 10 a.m. and park in front of the building. The building was in a largely black neighborhood. One man carried a ladder to the building; the other carried a red gas can. Judging from the way the man walked, the can was full when he entered the building and empty when he left. The men remained in the building for three to four minutes. Shortly after the men left, Kyles saw smoke coming out of the building.

Kyles identified defendant Wolf as the man carrying the gas can. Kyles had seen Wolf on three or four prior occasions at a paint store and another time when he paid Wolf the $130 rent on an apartment his aunt had leased at 715 South Lawndale.

Evelyn Mayberry saw a dark station wagon drive up to 715 South Lawndale on November 19, 1969. Two white men sat in the car for a while apparently looking to see if anyone was coming. She saw one man take a ladder out of the car. A second man took a silver-colored gasoline can from the back of the station wagon. Ms. Mayberry identified the second man as defendant Wolf, whom she had seen on several previous occasions. He had walked around to the back of the building at 715 South Lawndale on the Sunday prior to the fire. On Monday, he removed the locks from the front door. On Tuesday he drove past the building several times. On Wednesday, Wolf entered the building with the gas can between 9:30 and 10 a.m.

Ms. Mayberry went grocery shopping, and when she returned she learned there had been a fire at 715 South Lawndale.

Wolf testified on his own behalf. He stated he owned a station wagon in 1969. Three alibi witnesses testified on behalf of Wolf that they had had a meeting with him on the morning of the fire. Attorney Samuel Siegel testified Wolf was with him from 9:15 a.m. to 1:30 p.m. on November 19, 1969, and that he and Wolf had lunch together. He had no independent recollection of the meeting until he looked at his appointment calendar. The calendar, however, contained no indication of a meeting with Wolf on that day. It indicated only that Siegel had a 12:30 p.m. appointment with a client named Grosso. It did note a meeting with Wolf both two days before and two days after November 19. Ted Allen testified he saw Wolf in Siegel's office on November 19, 1969, and had lunch with Wolf. He had not remembered this meeting until he met with Siegel, Wolf, and the third alibi witness on the morning of the day he testified. The third witness, Anton Caithaimer, testified he saw Wolf at Siegel's law office between 9 a.m. and 1 p.m. on November 19, 1969. He had a cup of coffee with Wolf and Allen at about 12 p.m. Impeachment evidence consisting of time and pay records indicated Caithaimer was teaching school at that time on that day. He had been absent two days earlier.

The appellate court held that since Wolf was charged in count I with burning the building without Berland's consent, it was impossible for a single attorney to represent both defendants. It noted that the trial court should have perceived that there existed the possibility of conflicting defenses, thus it was incumbent upon the trial court to raise the issue *sua sponte* with respect to both defendants.

A defendant must show an actual conflict of interest manifested at trial in order to prevail in a constitutional claim of ineffective assistance of counsel due to joint representation of co-defendants by a single attorney. (*People* v. *Durley* (1972), 53 Ill. 2d 156, 159-61; *People* v. *McCasle* (1966), 35 Ill. 2d 552, 556; *People* v. *Somerville* (1969), 42 Ill. 2d 1, 9.) Other jurisdictions concur in this position (see *United States* v. *Mandell* (7th Cir. 1975), 525 F.2d 671, 677, *cert. denied* (1976), 423 U.S. 1049, 46 L. Ed. 2d 637, 96 S. Ct. 774; *United States* v. *Lovano* (2d Cir. 1970), 420 F.2d 769, 773; *United States* v. *Boudreaux* (5th Cir. 1974), 502 F.2d 557, 558; *United States* v. *LaRiche* (6th Cir. 1977), 549 F.2d 1088, 1095, *cert. denied* (1977), 430 U.S. 987, 52 L. Ed. 2d 383, 97 S.Ct. 1687; *United States* v. *Christopher* (9th Cir. 1973), 488 F.2d 849, 851; *State* v. *Jeffrey* (1973), 163 Mont. 92, 96, 515 P.2d 364, 367; *cf. United States* v. *Smith* (10th Cir. 1972), 464 F.2d 194, 197 (holding there must be prejudice)), although there is no consensus as to how strong a showing of conflict is required to establish a denial of the right to counsel. See *Holloway* v. *Arkansas* (1978), 435 U.S. 475, 484, 55 L. Ed. 2d 426, 434, 98 S. Ct. 1173, 1178.

The record is devoid of any evidence of an actual conflict of interest. Berland argues that count I was an indicium of a fundamental conflict which could not be cured by the fact that the count was nol-prossed. He argues that because a single attorney represented both defendants he could not prepare and try the case to show that Wolf was motivated to burn the building without Berland's assent. Wolf concurs that joint representation precluded the implementation of each defendant's interest in placing exclusive blame on the other.

These arguments are no different from those which can be raised in any instance of dual representation, yet

joint representation of co-defendants is not *per se* unconstitutional (*Holloway* v. *Arkansas* (1978), 435 U.S. 475, 482, 55 L. Ed. 2d 426, 433, 98 S. Ct. 1173, 1178; see *People* v. *Durley* (1972), 53 Ill. 2d 156, 160; *United States* v. *Mandell* (7th Cir. 1975), 525 F.2d 671, 677). The defendants merely speculate and attempt to create a conflict of interest through conjecture as to what might have been shown. They point to no actual conflict, and the record reveals none. This court will not disturb a judgment on the basis of hypothetical conflicts. *People* v. *McCasle* (1966), 35 Ill. 2d 552, 556; see also *Kruchten* v. *Eyman* (9th Cir. 1969), 406 F.2d 304, 311; *State* v. *Jeffrey* (1973), 163 Mont. 92, 97, 515 P.2d 364, 367.

Both defendants denied their guilt. Berland entered a simple denial. Wolf presented an alibi. There was no inconsistency in these defenses. Defense counsel effectively cross-examined the eyewitnesses who testified directly against Wolf by questioning the accuracy of their testimony. Count I was nol-prossed before the defense presented its evidence, thus removing any abstract possibility of conflict. Further, separate co-counsel appeared for Wolf before the close of the State's case. The record revealed no basis for either defendant to assert that the other alone burned down the building. The two men were longtime friends. Even after the fire they chose to be represented by the same counsel. The facts are analogous to those in *People* v. *McCasle* (1966), 35 Ill. 2d 552, where this court found it proper for a single attorney to represent both defendants. McCasle asserted on appeal that his co-defendant might have committed the robbery alone or with someone else, but the record contained no evidence to support such a theory. There was no inconsistency in their defenses. Both defendants denied knowing one another and presented alibi defenses.

People v. *Ware* (1968), 39 Ill. 2d 66, illustrates an instance of conflict, in contrast to facts here. A single attorney was appointed to represent two defendants. One pleaded guilty and testified against the other. There was a complete antagonism between the defendants mandating a reversal of the conviction. In *United States* v. *Gaines* (7th Cir. 1976), 529 F.2d 1038, a conflict of interest developed when defense counsel failed to call Gaines as a witness. The failure to call Gaines prevented him from retracting his withdrawn confession which had been introduced without the names of the co-defendants whom Gaines had implicated. It also served to protect his co-defendants, who counsel had represented through part of the proceedings, from the consequences of a cross-examination of Gaines concerning his confession which had implicated them.

The recent decision by the United States Supreme Court in *Holloway* v. *Arkansas* (1978), 435 U.S. 475, 55 L. Ed. 2d 426, 98 S. Ct. 1173, does not preclude joint representation. The court held that where, unlike here, appointed defense counsel raises the risk of a conflict of interest, the failure of the trial court to appoint separate counsel or take adequate steps to ascertain whether the risk was too remote to warrant separate counsel deprives the defendants of their right to the assistance of counsel. This was based on the rationale in *Glasser* v. *United States* (1942), 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457. There the court held that for a trial judge to insist upon joint representation in the face of objection undermines the general duty of the trial court to see that the trial is conducted with solicitude for the essential rights of the accused. In *Glasser* the trial court appointed an attorney retained by Glasser to represent his co-defendant over Glasser's objection. Actual instances of conflict appeared during the course of the trial.

By contrast, counsel here was not foisted upon either defendant. Nor does the record reveal any actual conflict. Each defendant selected and retained the trial counsel to represent him. No objection was made to joint representation until after conviction even though additional counsel represented Wolf prior to motions at the close of the State's case. See *People* v. *Somerville* (1969), 42 Ill. 2d 1, 9; *State* v. *Jeffrey* (1973), 163 Mont. 92, 97, 515 P.2d 364, 367.

People v. *Stoval* (1968), 40 Ill. 2d 109, *People* v. *Kester* (1977), 66 Ill. 2d 162, and *People* v. *Coslet* (1977), 67 Ill. 2d 127, relied upon by the defendants are not controlling. None involved joint representation of two defendants by a single attorney, and there, unlike here, actual conflicts due to competing commitments by the defense attorney to other current or former clients existed. In *People* v. *Stoval* counsel and his law firm represented the owner of the jewelry store the defendant was charged with burglarizing. In *People* v. *Kester* counsel, prior to becoming defense attorney, had worked on the case as a prosecutor. In *People* v. *Coslet* counsel represented both the defendant who had been charged with murdering her husband and the administrator of the husband's estate. A conflict arose since the estate stood to benefit from a conviction. Furthermore, all three cases involved appointed counsel, rather than retained counsel as here, demanding even closer scrutiny for conflicting interests (*People* v. *Stoval* (1968), 40 Ill. 2d 109, 113; *People* v. *Coslet* (1977), 67 Ill. 2d 127, 133; *People* v. *Kester* (1977), 66 Ill. 2d 162, 166).

This court adopted a *per se* conflict of interest rule in *People* v. *Stoval* (1968), 40 Ill. 2d 109, 113, which provides that if an attorney's commitments to others un-

dermine his loyalty to the defendant's interest, it is unnecessary to allege and prove prejudice to sustain a finding of a violation of the right to counsel. In formulating that rule this court relied upon *Glasser* v. *United States* (1942), 315 U.S. 60, 75-76, 86 L. Ed. 680, 702, 62 S. Ct. 457, 467, where it was said:

> "To determine the precise degree of prejudice sustained * * * is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

Glasser of course concerned an instance of enforced dual representation of defendants with actual conflicting interests. The record here, however, reveals no actual conflict; thus it is unnecessary to apply the *per se* rule. See also *People* v. *Ware* (1968), 39 Ill.2d 66, 68.

Wolf argues that upon the appearance of a possible conflict it is necessary for the trial court to inquire into the nature of the potential conflicts. Some jurisdictions require the trial court to admonish all jointly represented co-defendants about the possible conflicts inherent in dual representation and to inquire whether each defendant has voluntarily and with full knowledge of the consequences decided to accept such representation. If such inquiry is not made, the prosecution must show beyond a reasonable doubt that a prejudicial conflict of interest did not exist to avoid reversal of the convictions for lack of assistance of counsel. (See *Ford* v. *United States* (D.C. Cir. 1967), 379 F.2d 123, 125, relying on *Lollar* v. *United States* (D.C. Cir. 1967), 376 F.2d 243, 247; *State* v. *Olsen* (1977), ... Minn. ....., ..., 258 N.W.2d 898, 907-08; *cf.* *United States* v. *Lawriw* (8th Cir. 1977), 568 F.2d 98, 104-05

(placing duty on a trial court to make inquiry but holding that a presumption of prejudice does not arise if the trial court fails to make inquiry and refusing to shift the burden to the prosecution); *United States* v. *Foster* (1st Cir. 1972), 469 F.2d 1, 5 (placing duty of inquiry on the court but only shifting burden of persuasion to the prosecution to show that the existence of prejudice was improbable where inquiry was not made).) At the opposite end of the spectrum, the Seventh Circuit Court of Appeals holds only that the trial court should be watchful for indicia of conflict during trial. Only when an actual conflict appears is it necessary for the trial court to bring the fact of its existence to the attention of the defendant. (*United States* v. *Mandell* (7th Cir. 1975), 525 F.2d 671, 677; *United States* v. *Gaines* (7th Cir. 1976), 529 F.2d 1038, 1043-44.) Other jurisdictions take intermediary positions short of requiring judicial inquiry in all cases of joint representation. See *United States* v. *Lawriw* (8th Cir. 1977), 568 F.2d 98, 102-03, and cases cited therein; *State* v. *Jeffrey* (1973), 163 Mont. 92, 98, 515 P.2d 364, 368 (suggesting it would be wise to make such inquiry).

This court has refused an invitation to require trial judges to ascertain that co-defendants' decisions to proceed with one attorney are informed (*People* v. *Somerville* (1969), 42 Ill. 2d 1, 10). The crucial determination is whether there is a conflict, since absent such conflict there is no threat to a defendant's right to the assistance of separate counsel. Neither *Glasser* v. *United States* (1942), 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457, nor *Holloway* v. *Arkansas* (1978), 435 U.S. 475, 55 L. Ed. 2d 426, 98 S. Ct. 1173, indicate that a pretrial inquiry and waiver of separate counsel is mandated in all cases of joint representation. Because joint representation is not *per se* unconstitutional there is no need to require judicial inquiry un-

til the conflict appears. The language in *Glasser* and *Holloway* that it is the duty of the trial judge to see that the trial is conducted with solicitude for the essential rights of the accused is directed specifically to trial court insistence upon joint representation where counsel or the defendant has requested separate representation. Since there was no conflict here, judicial inquiry was not required.

The appellate court concluded there was insufficient evidence to support the convictions. On the basis of the record before us, we do not agree.

Wolf challenges the weight and credibility of the testimony of the two eyewitnesses. However, in a bench trial it is the province of the trial court to determine the credibility and weight of the testimony, to resolve the inconsistencies and conflicts therein, and to render its decision accordingly. This court will not substitute its judgment on these matters unless the proof is so unsatisfactory that a reaonable doubt of guilt appears. The trial court, unlike the reviewing court, was in a position to observe the witnesses. *People* v. *Pagan* (1972), 52 Ill. 2d 525, 534; *People* v. *Lofton* (1977), 69 Ill. 2d 67, 72-73.

The testimony of the two eyewitnesses was largely consistent both internally and when compared with the testimony of the other eyewitness. Both eyewitnesses agreed they saw two men enter the building between 9 and 10 a.m. One man, whom they identified as Wolf, carried a gas can into the building. Both had seen Wolf on several prior occasions lending further credence to their identification of him. Both identified Wolf in court. There were some inconsistencies in the testimony. Kyles said the gas can was red. Ms. Mayberry said it was silver colored. There was some confusion concerning the amount of hair Wolf had on the day of the fire as well as a discrepancy in the

testimony about the relative heights of the two men who entered the building. However, it is established that "[a] conviction will not be set aside merely because the evidence is contradictory." (*People* v. *Guido* (1962), 25 Ill. 2d 204, 208; see also *People* v. *Akis* (1976), 63 Ill. 2d 296, 298-99; *People* v. *Pagan* (1972), 52 Ill.2d 525, 533-34.) The trial judge, in handing down his decision, stated that he was impressed by the credibility of the eyewitnesses and noted that they had no reason whatsoever to lie. We perceive no basis to disturb the findings of the trial court.

The strength of the eyewitness testimony was not diminished by Wolf's alibi defense witnesses. The alibi witnesses' testimony was thoroughly impeached. Ted Allen had no recollection of the date of the meeting until he spoke with Wolf, Caithaimer, and Siegel on the day he testified. Siegel had no independent recollection of the meeting until he looked at his appointment calendar, but the calendar did not note a meeting with Wolf on that day. Caithaimer was teaching school when he testified he was meeting with Wolf. Siegel testified contrary to Caithaimer and Allen concerning who had lunch with Wolf. The trial judge was not obligated to believe the testimony of the alibi witnesses over the positive identification of the accused. (*People* v. *Jackson* (1973), 54 Ill. 2d 143, 149; *People* v. *Catlett* (1971), 48 Ill. 2d 56, 64.) Whether the alibi evidence created a reasonable doubt of guilt was a question primarily for the trial court (*People* v. *Garkus* (1934), 358 Ill. 106, 111-12), and here the trial judge indicated the alibi evidence did not convince him that the alleged meeting took place.

The appellate court placed undue emphasis on *People* v. *Gardner* (1966), 35 Ill. 2d 564, 571-73. It is clearly factually distinguishable. There, as here, guilt hinged upon the conflict between the strength of the identification tes-

timony and the strength of the alibi defense. In such cases, the alibi evidence cannot be ignored. However, this court noted that the testimony of a single witness that is positive and credible is sufficient to convict even if it is contradicted by the accused. In that case the identification of the defendant by the complaining witness was weakened by several factors, including inconsistent descriptions of the defendant and the lack of a lineup when the defendant was first identified, while the defendant's alibi was positive and unimpeached. Also, the alibi was not a recent concoction. By contrast the identification here was strong, and the alibi was impeached. Further, the alibi defense was of recent origin. The defense did not explore it until after trial began and several years after the incident.

Wolf argues that the testimony of Mayberry and Kyles is inherently incredible and, therefore, is insufficient to support a conviction. He cites *People* v. *Dawson* (1961), 22 Ill. 2d 260, 265-66. In that case the witnesses testified that a police officer went into a hotel taxi office where he was well known and demanded money from a driver at gunpoint in the presence of many witnesses after identifying himself as a police officer. He then remained in the hotel and had a drink at its bar. The witnesses here did not recount a blatantly preposterous story. They testified that two men entered a building. One man carried a gas can, and the other carried a ladder. They were men who had been seen working around the building on prior occasions. Their conduct, therefore, was not extraordinary like the alleged conduct of the defendant in *Dawson*.

Wolf also challenges the identification testimony by Mayberry and Kyles on the grounds that it was suggested by a mug shot of Wolf shown to them before trial. He did not challenge the photographic procedure prior to trial.

The witnesses were shown this picture in connection with the civil trial in the United States district court by an attorney for the insurance company before Wolf was indicted. We refrain from addressing the merits of this contention since it has been waived. *People* v. *Pierce* (1972), 52 Ill. 2d 7, 10.

Berland argues that the evidence against him was circumstantial, and therefore insufficient to support the conviction. It consisted of depositions and transcripts of proceedings from the civil case in the United States district court, housing files, the insurance application and policy, and evidence that the man who apparently notarized the application had died before the date of the application. Yet, even if the evidence was circumstantial, it is clear that it can support a conviction as long as it produces a reasonable and moral certainty that the defendant committed the crime. (*People* v. *Fletcher* (1978), 72 Ill.2d 66, 71; *People* v. *Williams* (1977), 66 Ill. 2d 478, 484-85.) Berland and Wolf were friends and business associates for 30 to 35 years. Wolf was involved in the acquisition and management of the property for Berland. The addresses of one of Berland's aliases, listed as a beneficiary of the land trust, were business addresses of Wolf. Wolf's nephew was at one point named as a beneficiary as security for a loan from Wolf to Berland. The building was losing money before the fire, and Berland was trying to sell it. He was compelled to take the property back because of the failures of the purchasers to meet the contract obligations. The poor condition in which Berland maintained the building had given rise to an action in the housing court for necessary repairs. There were 35 violations of the Municipal Code of Chicago, including the presence of vermin and structural violations.

Berland's application for fire insurance contained a false, notarized statement of his personal history of fire losses. Berland had brought the application to Wolf to have it notarized. The notary's name and seal were those of a man who had died 9 months before the application was notarized. The evidence indicates an intent to defraud an insurance company. Berland, of course, can be accountable for the offense even though he did not physically set fire to the building (Ill. Rev. Stat. 1969, ch. 38, par. 5-2). We find there was sufficient evidence to support his conviction.

The appellate court determined that the trial court erred in admitting the housing court files on relevancy grounds because the properties were not owned by the defendants. However, all were owned either by one of the defendants or their aliases. Further, the trial court did not consider similar unexplained fires on those properties. The evidence was admitted solely to show the defendants' business relationships in other similar types of property.

Berland contends that the trial court gave undue and prejudicial consideration to the fact that the property was insured for almost three times its initial cost and the cost of subsequent repairs. He argues also that he was prejudiced by his counsel's failure to introduce evidence of the replacement cost of the building after presenting evidence that insurance is calculated on the basis of replacement cost rather than acquisition cost. However, as the trial court noted, the gist of the fraud was the burning of the building to collect insurance proceeds regardless of the replacement cost and whether the building was overinsured or underinsured.

Berland and Wolf each argue it was error to admit prior statements of their co-defendant. That evidence was admitted pursuant to a stipulation subject only to an

objection to references to prior fires, and there is no indication in the record that the trial judge, sitting as the trier of fact, improperly considered the prior statements of one co-defendant as substantive evidence against the other. Under these circumstances there is no reason to deviate from the sound presumption that the court in a bench trial relies only on proper evidence in reaching a determination on the merits (*People* v. *Gilbert* (1977), 68 Ill. 2d 252, 258-59; *People* v. *Pelegri* (1968), 39 Ill. 2d 568, 574-75; *People* v. *Delno* (1966), 35 Ill. 2d 159, 162).

Because of its disposition of the cause, the appellate court did not reach all the issues presented to it, but as noted in *Nelson* v. *Union Wire Rope Corp.* (1964), 31 Ill. 2d 69, 112-13, "it has frequently been indicated that where this court acquires jurisdiction for any reason, it has jurisdiction to pass upon all questions, except those requiring a weighing of the evidence, proper to be passed upon and disposed of in the case. (*Goodrich* v. *Sprague*, 376 Ill. 80; *Bowman* v. *Illinois Central Railroad Co.*, 11 Ill. 2d 186.) Aside from considerations going to the avoidance of multiplicity of appeals, there are in our opinion unique circumstances here which, as a matter of discretion and justice, impel us to use our powers on review to the utmost and to finally dispose of the case." These proceedings arose out of a fire which occurred in 1969 for which the defendants were indicted in 1973. The parties have briefed the remaining issues of whether retained counsel was competent and whether the State violated due process by listing the witness Mayberry twice in response to discovery, once under her own name and once under the name of her common law husband. Moreover, the record enables us to fully determine these matters. (*County of Cook* v. *Lloyd A. Fry Roofing Co.* (1974), 59 Ill. 2d 131, 138-39.) We shall therefore address these questions.

Both Berland and Wolf challenge the competency of their retained trial counsel. After an examination of the record in the instant case in light of the applicable test, we cannot say that counsel was incompetent. He conducted discovery, sought to suppress evidence, and vigorously cross-examined the State's witnesses. Wolf also received the services of additional counsel who entered his appearance during the latter part of the presentation of the State's case. Defendants were entitled to competent, not perfect, counsel. *People* v. *Murphy* (1978), 72 Ill. 2d 421, 438.

Wolf argues, on the basis of *Brady* v. *Maryland* (1963), 373 U.S. 83, 10 L. Ed. 2d 215, 83 S.Ct. 1194, that he was denied a fair trial due to the prosecution's failure to notify defense counsel that the witnesses Ms. Mayberry and Ms. McGowen are the same individual. The two names appeared on a list presented to the defense in response to a discovery request for a list of witnesses. The addresses under the two names were the same. The witness had used the name McGowen, her common law husband's name, when she testified in the United States district court but used her own name, Mayberry, when she testified in the criminal action now pending.

The United States Supreme Court held in *Brady* that the prosecution's suppression of a confession by the defendant's companion deprived the accused of due process since the evidence was material to his guilt. By contrast, in the instant case the prosecution had not suppressed any evidence. Both names were furnished to the defendants. Further, as this court has noted, in determining whether it was error to allow witnesses to testify even though they had not been listed in response to discovery, the function of the list of witnesses is to prevent

surprise and afford an opportunity to combat false testimony. (*People* v. *Steel* (1972), 52 Ill. 2d 442, 450.) In the present case, the defendant was afforded an opportunity to examine the witness under both her names. The double listing did not deprive Wolf of any evidence material to his guilt; thus he was not denied a fair trial. See *United States* v. *Agurs* (1976), 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392.

Defendants also contended in the appellate court that the State had failed to prove the corporate existence of the insurance company alleged to have been defrauded. Even if the State failed to offer testimony to establish the insurance company's corporate existence, courts may take judicial notice of its existence since it is a matter of public record. (See *Department of Public Welfare* v. *Bohleber* (1961), 21 Ill. 2d 587, 593.) Defendants were in no way prejudiced by any failure to prove corporate existence. They were notified of the charges against them and are protected from double jeopardy; the indictment clearly identified American Casualty Company as the insurance company alleged to have been defrauded and enabled the accused to prepare their defenses (*People* v. *Dickerson* (1975), 61 Ill. 2d 580, 582; *People* v. *Grieco* (1970), 44 Ill. 2d 407, 409). Defendants are not entitled to reversal of their convictions.

For the reasons stated, the judgment of the appellate court is reversed, and the judgment of the circuit court is affirmed.

Appellate court reversed;
circuit court affirmed.

APPENDIX C

Supplemental Opinion on Denial of Rehearing

Defendant Albert Berland's petition for rehearing is denied. Defendant Louis Wolf's petition for rehearing calls this court's attention to issues raised in two petitions for relief under section 72 of the Civil Practice Act (Ill. Rev. Stat. 1975, ch. 110, par. 72) filed in the circuit court during the pendency of his direct appeal to the appellate court, which was filed on September 27, 1974. The first section 72 petition was filed on March 18, 1975; the second was filed on September 23, 1976, with a supplemental petition filed on October 8, 1976. On motion of the State, the trial court dismissed the first petition on July 18, 1975, on the ground that the issues raised were not properly before the court in the section 72 petition. The memorandum of orders included in the record and the notice of appeal in the second section 72 petition indicate that it was dismissed on February 14, 1977. Wolf prosecuted separate appeals to the appellate court, which consolidated them on its own motion on March 2, 1978. This court, on March 21, 1978, allowed the State's motion to transfer the section 72 appeals to this court and to consolidate them with the direct appeal then pending.

No oral argument was presented to this court concerning the points raised in Wolf's section 72 petitions when the consolidated cases were argued on May 10, 1978. Wolf's petition for rehearing clearly states this but argues that Wolf has been denied his right to have his appeal considered. Without deciding the nature of the asserted right to appeal, we consider whether the trial court erred in dismissing the petitions. The points relied upon are raised in the two sets of appellate briefs transferred to this court without change in substance or caption.

The circuit court properly dismissed the first section 72 petition. A section 72 proceeding is the forum in which

"to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time of trial, which, if then known, would have prevented the judgment." (*Ephraim* v. *People* (1958), 13 Ill. 2d 456, 458; see also *People* v. *Hinton* (1972), 52 Ill. 2d 239, 243.) Since most of the exhibits relied upon in the appellate brief were incorporated in the post-trial proceedings and in the record on direct appeal, a section 72 petition to examine them would be unwarranted. The trial court had already evaluated the exhibits in the post-trial proceedings; it had held that the evidence contained therein either was known or should have been known to the defendant prior to trial and, in any event, did not justify a new trial since it would not have probably changed the result. The trial court had also concluded, after consideration of the exhibits, that trial counsel was not incompetent.

Specifically, the matters raised in Wolf's section 72 exhibits Nos. 2, 4, 5, 6, 7, 9, 14, 21, and 23 were included in the post-trial motion, were argued at the post-trial hearing, and were incorporated in the record on direct appeal. Those exhibits contained police and fire department reports of interviews with testifying and nontestifying witnesses, transcribed statements and a deposition of testifying and nontestifying witnesses, and the Federal testimony of testifying witness Evelyn Mayberry. Variation between Ms. Mayberry's testimony at trial and her prior testimony in the United States district court was raised on direct appeal in this court. The issue of whether Wolf was bald and the defense's failure to introduce photographs of Wolf taken in 1968 and 1969 was also raised in the post-trial motion and at the post-trial hearing. A section 72 petition is not designed to provide a general review of all trial errors nor to substitute for direct appeal.

(*People* v. *Jennings* (1971), 48 Ill. 2d 295, 299; *People* v. *Mamolella* (1969), 42 Ill. 2d 69, 72; *Ephraim* v. *People* (1958), 13 Ill. 2d 456, 460.) Points previously raised at trial and other collateral proceedings cannot form the basis for a section 72 petition. See *Ephraim* v. *People* (1958), 13 Ill. 2d 456, 459; *Brunswick* v. *Mandel* (1974), 59 Ill. 2d 502, 504.

The petition argues that the State obtained Wolf's conviction through the suppression of evidence tending to negate his guilt in violation of our Rule 412 (50 Ill. 2d R. 412). However, the issue of the State's alleged suppression of evidence and noncompliance with discovery, including matters specifically raised in the section 72 petitions, were presented to the trial court at the post-trial proceedings and cannot be raised again. The fact that the State did not call all witnesses to the fire was also brought to the attention of the trial court in the post-trial proceedings.

Although a challenge to identification procedures was raised and addressed in the post-trial proceedings and on direct appeal, Wolf again raises the issue in his section 72 petition. Exhibit No. 17 is a hearsay report of interviews with witnesses allegedly conducted by Wolf's investigator after the trial court entered its judgment. The report indicates that after the fire the police showed the witnesses a mug shot of Wolf and inaccurately told them that the man in the photograph had already been arrested and charged. Exhibit No. 20 is a purported affidavit by Ms. Mayberry that someone at the police station pointed Wolf out to her as the arsonist a couple of months after the fire so she could identify him at trial. In response, the State filed two affidavits by Thomas Begg, an Illinois Bureau of Investigation agent, that witness Evelyn Mayberry and Albert Kyles told him that they never gave a post-trial statement to Wolf's investigator and that he had never

pointed Wolf out to Ms. Mayberry. The State also asserts that Ms. Mayberry's signature on exhibit No. 20 is different from another signature from a month later. The State points out that all three witnesses to whom Wolf's arguments point were known to the defense prior to trial. Robert Drain and Albert Kyles were on the State's list of witnesses. Ms. Mayberry was in fact interviewed prior to trial. There was nothing to indicate that Wolf was prevented from discovering and raising these matters at trial. (*Glenn* v. *People* (1956), 9 Ill. 2d 335, 340; see *People* v. *Colletti* (1971), 48 Ill. 2d 135, 137-38.) Further, the allegations and supporting documents were merely cumulative and would not have prevented the judgment rendered beyond a reasonable doubt. See *Williams* v. *People* (1964), 31 Ill. 2d 516, 518; *Ephraim* v. *People* (1958), 13 Ill. 2d 456, 458; *cf. Chapman* v. *California* (1967), 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824.) The two testifying witnesses had seen Wolf prior to the fire as well as on the day of the fire, providing an adequate independent basis for the in-court identification. (See *People* v. *Williams* (1975), 60 Ill. 2d 1, 10-11.) These exhibits did not present a basis for section 72 relief.

The first petition argues that Wolf's conviction was the result of perjured testimony and relies on the exhibits filed to support the allegations. A section 72 petition can provide a basis for relief from a judgment based on perjury. (*People* v. *Jennings* (1971), 48 Ill. 2d 295, 298; *People* v. *Lewis* (1961), 22 Ill.2d 68, 70-71.) However, the trial court did not err in dismissing the petitions since all the inconsistencies in the witnesses' statements charged in the petitions as amounting to perjury were before the court in the post-trial proceedings. Counsel for Wolf presented a detailed analysis of the evidence at the post-trial hearing and intimated that the testimony given was false. Fur-

thermore, the allegations in the petition and supporting document do not support a charge of perjury and therefore offered no basis for an evidentiary hearing. (See *People* v. *Jennings* (1971), 48 Ill.2d 295, 298-99; *cf. Withers* v. *People* (1961), 23 Ill. 2d 131, 135.) An examination of the exhibits reveals no more than discrepancies in descriptions of defendant and what he was carrying given by different witnesses and by the same witnesses at different times, and variations in what different witnesses reported they saw, rather than the knowing use of false testimony. This does not indicate perjury. (See *People* v. *Strother* (1972), 53 Ill. 2d 95, 100-01; *People* v. *Lagios* (1968), 39 Ill. 2d 298, 301.) In sum, the trial court did not err in dismissing the petition.

The second section 72 petition is barred by the two-year limitations period applicable to section 72 proceedings (Ill. Rev. Stat. 1975, ch. 110, par. 72(3); *People* v. *Colletti* (1971), 48 Ill. 2d 135, 137.) The petition was filed on September 23, 1976, and the supplement to the petition was filed on October 8, 1976, which was more than two years after the judgment of conviction was entered and the sentence imposed on April 9, 1974. The bar of the statute of limitations is tolled only by legal disability, duress, or fraudulent concealment of the grounds for relief. (Ill. Rev. Stat. 1975, ch. 110, par. 72(3); *People* v. *Colletti* (1971), 48 Ill. 2d 135, 137; *Withers* v. *People* (1961), 23 Ill. 2d 131, 133.) Although Wolf, in reply to the State's motion to dismiss, alleged fraudulent concealment and generally argues that the State suppressed evidence, the trial court dismissed the section 72 petition following a hearing on the issue of fraudulent concealment and an examination of exhibits filed in support of the petition. A review of the hearing testimony by the two assistant State's Attorneys who conducted the prosecution indicates no basis on which to conclude that the State fraudulently concealed evidence

from the defendant and indicates that the judgment of dismissal is not against the manifest weight of the evidence. The substance of the testimony was that the prosecutors had never seen exhibits Nos. 3, 5, and 6, consisting of an appraisal of fire damage and two fire department reports, until several weeks prior to the hearing on the second petition, and that exhibit No. 2, the fire investigation report, was made available to defense counsel. In fact, exhibit No. 2 was attached to both the first section 72 petition and the post-trial motion. Fire Marshal Lynch, whose affidavit Wolf obtained in November 1976, was included on the State's list of witnesses.

The bar of the statute of limitations cannot be avoided by asserting that the second section 72 petition was merely a continuation of the first. Attorney Witney conceded at the hearing on the second petition that it was not a continuation of the first. The first proceedings had already terminated at the trial level, and a notice of appeal had been filed on August 16, 1975, more than a year prior to the filing of the second petition.

Even if we put aside the bar of the statute of limitations, an examination of exhibits reveals no factual allegations sufficient to sustain Wolf's charge of perjury. (See *People* v. *Jennings* (1971), 48 Ill. 2d 295, 299.) The new exhibits indicate only that the fire battalion chief and fire marshal who were present during the fire did not know what caused it and placed the point of origin at a different place than did the fire inspector who examined the premises after the fire and provided evidence at trial that the fire had been set. The fire damage appraisal indicates only that the dollar amount of damage did not correspond directly to the point of origin of the fire and the intensity of the heat in light of the size of the rooms affected and the presence of damage not attributable to the point of greater

intensity of heat. The fire inspector's in-c[illegible] testimony did not contradict his written fire report. Th[illegible] the exhibits failed to support an allegation that the conviction was based on the knowing use of false testimony.

For the reasons stated, the judgments of the circuit court dismissing Wolf's section 72 petitions are affirmed and the petition for rehearing is denied.

Judgments affirmed;
rehearing denied.

No. 78-1742

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

LOUIS WOLF,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENTS IN OPPOSITION

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Printed by Authority of the State of Illinois — 8-79-40

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Illinois Appellate Court, First District, is reported as *People* v. *Albert Berland, et al.*, 52 Ill. App.3d 96, 376 N.E.2d 181 (1st Dist. 1977). The opinion of the Illinois Supreme Court, reversing the judgment of the Illinois Appellate Court, is reported as *People* v. *Albert Berland, et al.*, 74 Ill.2d 286, 385 N.E.2d 649 (1979).

JURISDICTION

The jurisdictional requisites have been set forth in the Petition for a Writ of Certiorari. However, as treated more fully within the following argument, the respondent does not believe that the petitioner has shown any good reason for this court to exercise its sound judicial discretion to grant his Petition.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioner received the effective assistance of counsel where counsel was privately retained, the petitioner's defense at trial did not conflict with that of the codefendant and there is no showing that a different result would have obtained had the petitioner and the codefendant procured separate counsel.

2. Whether the prosecution's disclosure of the identity of a state's witness under two different names at the same address complied with the Illinois discovery rules and this Court's decision in *Brady* v. *Maryland*, especially where the record shows that the defense always knew the identity of the witness.

STATEMENT OF THE CASE

The petitioner, Louis Wolf, was convicted of the crime of arson with intent to defraud an insurer in violation of Illinois Revised Statutes (1969), ch. 38, sec. 20-1(b). He was sentenced to serve a term of 1½ to 4½ years in the Illinois State Penitentiary and was ordered to pay a fine of $10,000. Tried and convicted with Petitioner Wolf was a codefendant, Albert Berland.

THE PURCHASE OF THE SUBJECT PROPERTY

The subject premises in the instant case, a partially occupied, multi-unit, three story, dilapidated apartment building, located at 715 South Lawndale Street, in Chicago, Illinois, was purchased by petitioner's codefendant, Berland for $18,000 in 1966. On November 19, 1969, the building was partially consumed and rendered permanently damaged in an arson fire.

Both the petitioner and Berland were involved in the building's purchase. During the purchase negotiations, Berland introduced petitioner to the seller as the prospective buyer, and represented himself to be the broker. (People's Exhibit No. 3 at 118, 119; People's Exhibit No. 5 at 146; R. 465, 477, 478[1] Petitioner testified that when the original contract was made to purchase the property, he contacted the owner and purchased the property alternatively, in his name or in the name of his nominee. (R. 477-478)

Both the petitioner and Berland were involved in the chain of title to 715 South Lawndale. At one point the beneficiary of the trust was listed as "Fred Cooper." (People's Ex. No. 5 at 68; see also People's Ex. No. 14) "Fred Cooper" was an alias used by Albert Berland. (People's Ex. No. 5 at 70) Significantly, Cooper's address was given as 1614 South Kedzie and 2840 North Broadway. (People's Ex. No. 14) Both of these locations were in fact business addresses of, petitioner Louis Wolf. (People's Exhibit No. 4, at 56; People's Exhibit No. 3, at 72, 75)

In addition, for a period of time, the name William Berke appeared as the beneficiary to the trust in which was placed the title to 715 South Lawndale. (People's Ex. No. 5 at 143)

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[1] R. designates the transcript of record. R. C designates the common law record. People's Exhibit refers to those exhibits introduced into evidence at trial by the People, the respondent here. Pet. Post-Trial Exhibit refers to those exhibits introduced into evidence during the arguments on petitioner-defendant's post-trial motions.

William Berke was petitioner's nephew. His name appeared as beneficiary as a result of a loan made by petitioner to Berland. As collateral for this loan, Berland named Berke as beneficiary. (People's Ex. No. 5, at 143; People's Ex. No. 2, at 43; R. 503-5)

The petitioner was heavily involved with Berland in the management of and collection of rents from 715 South Lawndale. Soon after the building became Berland's property petitioner Wolf offered his services to find good tenants for Berland, and to collect rents. (People's Ex. No. 5, at 65, 66)

From September, 1969, until the fire in November, 1969, petitioner again lent his services to Berland at Berland's request. (People's Ex. No. 8 at 298; People's Ex. No. 5, at 64). Petitioner and petitioner's employee attempted to collect the rents from 715 South Lawndale. (People's Ex. No. 5, at 126, 66) Petitioner would also examine the building's physical condition, (People's Ex. No. 1, at 20) buy coal for the building, (People's Ex. No. 5, at 127) and would, at times, refer various subcontractors to Berland. (People's Ex. No. 3, at 121)

Most of these facts petitioner admitted as being true (People's Ex. No. 1, at 20; People's Ex. No. 3, at 121; People's Ex. No. 7, at 468; R. 467) Petitioner's repeated presence around the building was corroborated by the two eyewitnesses, Albert Kyles and Evelyn Mayberry, who also testified at trial that petitioner was at the scene of the fire. Albert Kyles had seen petitioner collect the rent from his aunt who had previously lived in the building at 715 South Lawndale. (R. 111, 128) Kyles had even once paid the rent to petitioner himself. (R. 130) Petitioner admitted that he had possibly collected the rent at 715 South Lawndale as many as ten times. (R. 499) When petitioner collected the rents it was at Berland's request (R. 498-499) Evelyn Mayberry had seen petitioner around 715 South Lawndale on the Sunday, Monday and Tuesday previous to the fire on Wednesday. (R. 141)

The petitioner was so involved with the management of Berland's building that in October, 1969, petitioner filed a suit against Thelma Dillon, a tenant in 715 South Lawndale. (People's Ex. No. 6, at 35; People's Ex. No. 8, at 317; *Wolf* v. *Dillon*, 69 MI 80679 filed October 14, 1979) in his own name on Berland's behalf.

The evidence at trial showed that the building at 715 South Lawndale was a disastrous financial venture. During the two years prior to the fire, Berland's proceeds from the rental property had steadily diminished. In the month prior to the fire, only $250 in rent payments were collected, only 2 of the 4 tenants were paying rent and the building was two-thirds vacant. (People's Exhibit No. 5 at 5, 104)

Berland had attempted to sell the building on contract three times during the two years prior to the fire. For one reason or another every buyer defaulted on the purchase of the building. (People's Exhibit No. 5 at 59-62)

Berland had been cited by the City of Chicago for over 35 building code violations concerning the subject premises. The City of Chicago had asked for a fine of $6,800 or the correction of the code violations. The cause was continued until November 20, 1969, but on November 19, 1969, the day before the scheduled hearing the building was set on fire and burned. (People's Group Exhibit No. 14)

THE FIRE INSURANCE AND THE FRAUDULENT INSURANCE APPLICATION

On June 30, 1969, an application for fire insurance was received by the Illinois Fair Plan Association. The application was submitted on behalf of the Lawndale National Bank, Trust Number 4946, with Albert Berland, listed as the owner of the subject building. Berland listed the value of the property as $125,000 and requested $100,000 worth of coverage. The application contained the question, "give the applicant's five-

year loss record for fire and extended coverage perils." (R. 71) (People's Group Exhibit No. 9) Berland stated on the application that he had no history of fire losses in the five years prior to the application date of the policy. (People's Exhibit No. 10) Since 1967, and prior to the fire in 1969, Berland sustained fire losses on eight separate occasions. (People's Exhibit Nos. 5 at 15, 17, 18, 20, 21, 24, 26, 27, 28) Albert Berland's signature appeared on the policy application. (R. 63-65)

Prior to submitting the application, Berland brought it to the petitioner, to have it notarized. (People's Exhibit No. 8, p. 415). The application was purportedly notarized by Maurice Blumenthal on June 20, 1969 (People's Exhibit No. 9), which was slightly over nine months after Blumenthal's death in an automobile accident. (People's Exhibit No. 13) The statement on the notary license said that it would expire in November of 1970. However, if Blumenthal had lived his license would have expired in February, 1971. (People's Exhibit No. 12)

On August 13, 1969, the American Casualty Company of Reading, Pennsylvania, a member of the Fair Plan Group (R. 66), issued a $100,000 insurance policy on 715 South Lawndale for the period of one year. (People's Ex. No. 9; R. 67-69)

THE ARSON FIRE

Evelyn Mayberry testified that, on the date of the fire, she lived at 716 South Lawndale in an apartment across the street from the subject premises. Two men in a dark colored station wagon pulled up on Lawndale Street going north. They parked on the east side of the street and sat in the car for a while looking up and down the block. It appeared as if they were watching to see if anyone was coming. The man on the driver's side exited and took a gasoline can out of the back of the station wagon. He went into the building at 715 South Lawndale. Then the other individual took a ladder out of the station wagon and also entered the building at 715 South Lawndale.

Mrs. Mayberry identified petitioner, Louis Wolf, as the man who carried the gasoline can into the building. (R. 134-139)

Mrs. Mayberry recognized the first individual, the one who took the gas can out of the automobile, because she had seen him the previous Sunday, November 16, 1969. That day petitioner and another man were parked in the alley just east of her apartment building. She watched him for about five minutes that day but did not know what he was doing. On the Monday prior to the fire, she saw petitioner taking the locks off 715 South Lawndale. Again, he was accompanied by another individual. On Tuesday, Wolf and another man drove by the building two or three times in a dark colored station wagon. (R. 140-141)

Albert Kyles testified that on the morning of November 19, 1969, he was sitting on the front steps of the apartment building, directly across from 715 South Lawndale. He saw two men in a station wagon pull up in front of the building and park across the street from where he was sitting. Both men exited from the car. The driver carried a gas can and the other man went around to the back of the station wagon and took out a ladder. Mr. Kyles saw both men enter the building. In court, Mr. Kyles identified petitioner as the man who was the driver of the car. (R. 105-107) Albert Kyles had seen petitioner collect the rent from his aunt who had previously lived in the building at 715 South Lawndale. (R. 111, 128) Kyles had even once paid the rent to petitioner himself. (R. 130) Petitioner stated that he had possibly collected the rent at 715 South Lawndale as many as ten times. (R. 499)

Petitioner Wolf was carrying the gasoline can and was leaning to one side, as if there was something in the can. The men went into the building and exited a few minutes later. When petitioner came out of the building Mr. Kyles noticed that he was swinging the gas can as if it were empty. The two men got into the car and drove off. (R. 108-109)

After several minutes elapsed Mr. Kyles noticed that there was smoke coming from the building at 715 South Lawndale. The fire department arrived and Mr. Kyles remained at the scene.

After the fire was extinguished, Lieutenant Burns of the Chicago Fire Department entered the premises at 715 South Lawndale. He determined that the fire began in a vacant third floor apartment in the bathroom. The bathroom contained no materials that would sustain combustion. Lieutenant Burns testified that the fire burned downward and said that "heat or fire never burns downward unless there is an outside force of some sort, and in this particular instance it would be an accelerant." (R. 168-169) Lieutenant Burns' extensive testimony showed that the fire was not of natural origin and was caused by an accelerant.

At trial, petitioner presented an alibi defense which the Illinois Supreme Court later characterized as a "recent concoction," and being of "recent origin." The Court held that "The identification was strong and the alibi was impeached." *People* v. *Berland, supra*, 74 Ill.2d at 307. The petitioner stated that on the morning of the fire he was at the offices of his attorney, Samuel Siegel. (R. 489) Three alibi witnesses, Ted Allen, Anton Caithaimer and Samuel Siegel testified that they were with the petitioner at that meeting. As the Illinois Supreme Court said:

> Ted Allen had no recollection of the date of the meeting until he spoke with Wolf, Caithaimer, and Siegel on the day he testified. Siegel had no independent recollection of the meeting until he looked at his appointment calendar, but the calendar did not note a meeting with Wolf on that day. Caithaimer was teaching school when he testified he was meeting with Wolf. Siegel testified contrary to Caithaimer and Allen concerning who had lunch with Wolf. *Berland, supra*, at 306-307

THE ALLEGED SUPPRESSION OF EVIDENCE

The Illinois Supreme Court held that the prosecutor had not suppressed any evidence in the instant case, *Berland, supra*, 74 Ill. 2d 286 at 311-312, and that it was not error to list the same individual, Evelyn Mayberry under two separate names at the same address in the State's answer to discovery. The Illinois Supreme Court held that petitioner Wolf was not deprived of any evidence material to his guilt and was not denied a fair trial. Additionally, the Illinois Supreme Court held that all of the evidence about which the petitioner complains was known or should have been known to the petitioner prior to trial. *Berland, supra*, 74 Ill.2d 286, 314.

The record is replete with examples which show that the petitioner always was aware that Evelyn Mayberry and Elizabeth McGowan were the same individual, and the record also shows that the State complied with discovery procedures.

The facts necessary to show that the petitioner was not prejudiced and that the Illinois Supreme Court properly determined this issue are contained in the argument.

THE TRIAL AND THE APPEAL

The petitioner and Berland were charged with the crime of arson, committed with intent to defraud an insurer, in violation of Illinois Revised Statutes (1969), ch. 38, sec. 20-1(b) of the Criminal Code. They were also charged with conspiracy to commit arson in violation of Illinois Revised Statutes (1969), ch. 38, sec. 8-2. Petitioner, was charged with arson (burning a building without the owner's consent) in violation of Illinois Revised Statutes (1969), ch. 38 sec. 20-1(a). On May 11, 1973, the grand jury returned the indictment (No. 73-1441) in the instant cause. (R. C4-7) Berland and the petitioner hired one private counsel to conduct their defense. During the

presentation of the State's case in chief petitioner procured additional counsel to represent him during the trial. (R. 202) Count one of the indictment charging petitioner with arson, in that he burned a building without the owner's consent, was *nolle prossed* at the close of the State's case-in-chief.

Both Berland and petitioner pleaded not guilty. Petitioner testified and denied his presence at the scene of the fire. Neither Berland nor petitioner sought to establish his defense by implicating the other.

After a bench trial, both the petitioner and Berland were found guilty of arson, with intent to defraud an insurer, and conspiracy to commit arson. A motion in arrest of the judgment on the conspiracy count was granted on the basis that the applicable statute of limitations had expired. The petitioner was represented by new counsel at the extensive argument on the post-trial motions. The petitioner was sentenced to serve a term of 1½ to 4½ years in the Illinois State Penitentiary and was ordered to pay a fine of $10,000.

Following the petitioner's conviction he filed a timely appeal to the Illinois Appellate Court, First District. That court reversed the petitioner's conviction for arson with the intent to defraud an insurer on the basis that petitioner had been denied the effective assistance of counsel due to counsel's alleged conflict of interest, on the basis that the State failed to prove petitioner guilty beyond a reasonable doubt in that credence should have been given to the alibi witnesses and that one of the witnesses had been listed in the list of witnesses under two different names. *People* v. *Berland*, 52 Ill. App. 2d 96, 376 N.E.2d 18, (1st Dist. 1977). rev'd. 74 Ill. 2d 286, 385 N.E. 2d 649 (1979).

Pursuant to the provisions of Illinois Revised Statutes (1977) ch. 110A, sec. 615, the People of the State of Illinois petitioned the Illinois Supreme Court for leave to appeal the judgment of the Illinois Appellate Court, First District. The Illinois Supreme Court granted leave to appeal and reversed

the judgment of the Illinois Appellate Court, First District. *People* v. *Berland*, 74 Ill.2d 286, 385 N.E.2d 649 (1979). In its opinion the Illinois Supreme Court held *inter alia*, that there was no actual conflict of interest in privately retained defense counsel's joint representation of petitioner and his co-defendant, that counsel's representation was competent, that the petitioner was proved guilty of arson with intent to defraud an insurer beyond a reasonable doubt and that the People did not suppress any evidence favorable to the petitioner.

The petitioner filed a petition for rehearing in the Illinois Supreme Court in which he challenged the trial court's dismissal of two petitions for relief under section 72 of the Illinois Civil Practice Act (Ill. Rev. Stat. 1975, ch. 110, sec. 72) In Illinois, a proceeding pursuant to section 72 is a collateral proceeding "to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and the court at the time of trial, which, if then known, would have prevented the judgment." *Berland, supra*, 74 Ill. 2d 286, at 314. Appeals from the trial court's dismissal of the two section 72 petitions were consolidated with the direct appeal in the Illinois Supreme Court.

The Illinois Supreme Court affirmed the judgment of the trial Court stating that everything the petitioner had raised was presented to the trial court either on the post-trial motions or at the hearings on the two section 72 petitions. Matters considered by the court included petitioner's allegations that certain witnesses at trial had perjured themselves. The Illinois Supreme Court held that the allegations in the petitions and supporting documents and exhibits did not support a charge of perjury and therefore offered no basis for an evidentiary hearing or for reversal.

It is from the decision of the Illinois Supreme Court that the petitioner brings this petition for *certiorari*.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

THE PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL WAS PRIVATELY RETAINED, THE PETITIONER'S DEFENSE AT TRIAL DID NOT CONFLICT WITH THAT OF THE CODEFENDANT AND THERE IS NO SHOWING THAT A DIFFERENT RESULT WOULD HAVE OBTAINED HAD THE PETITIONER AND THE CODEFENDANT PROCURED SEPARATE COUNSEL. PETITIONER HAS FAILED TO SHOW ANY NEED FOR THIS COURT TO GRANT HIS PETITION FOR A WRIT OF CERTIORARI.

The petitioner seeks the granting of a writ of certiorari by this Court, and claims that the facts in the instant case would allow resolution of the questions of how strong a showing of conflict of interest must be and the scope of the duty of the trial court in cases where jointly represented defendants have allegedly conflicting interests. (Pet. for Cert. at 12-13) The respondents maintain, however, that the facts in the instant case neither permit the formulation, nor the resolution of either question posed by the petitioner. Moreover, the respondent notes at the outset that a petition for a writ of certiorari is improperly brought upon this basis, for the petitioner has failed to show that the Illinois Supreme Court has decided such a question in a way probably not in accord with applicable decisions of this Court. See, Rule 19(1)(a) of the Supreme Court of the United States. Although the petitioner has completely failed to show the need for this Court, in its sound discretion, to grant his petition, the respondent, believing that the Illinois Supreme Court has properly determined this issue upon the merits will briefly address those merits.

The Illinois Supreme Court in its opinion below in the instant case, held that "a defendant must show actual conflict of interest manifested at trial in order to prevail in a constitutional claim of ineffective assistance of counsel due to joint representation of co-defendants by a single attorney." *People* v. *Berland*, 74 Ill.2d 286, 289, 300, 385 N.E.2d 649 (1979). The petitioner has not shown, and cannot show, that an actual conflict of interest existed under the instant facts.

The indictment returned against the petitioner and his co-defendant consisted of three counts. Only counts one and two are relevant here. Count one charged petitioner, Louis Wolf with arson, in that he burned the apartment building located at 715 South Lawndale, Chicago, without the consent of the owner, in violation of Illinois Revised Statutes (1969) Ch. 38, § 20-1(a). (R. C4) Count two charged both petitioner, Louis Wolf, and Albert Berland, with the crime of arson, committed with the intent to defraud an insurer, (R. C5) in violation of Illinois Revised Statutes (1969) Ch. 38 § 20-1(b). Count one of the indictment, which charged Wolf with burning a building owned by Albert Berland, without his consent, was *nolle prossed* on the People's motion at the close of the People's case when the court stated that it would preclude proof on both counts one and two. (R. 321) The petitioner and his codefendant were convicted on count two of the indictment which charged them with arson with intent to defraud an insurer. Petitioner and his codefendant were represented at trial by one privately retained counsel. Additional counsel was hired by the petitioner and entered his appearance during the presentation of the State's case in chief. New, privately retained counsel represented the petitioner during the post-trial motions and on appeal.

The Illinois Supreme Court held that the record in the instant case was "devoid of any evidence of an actual conflict of interest." *Berland, supra,* 74 Ill. 2d at 300. The respondent submits that the Illinois Supreme Court was clearly correct.

Wolf's defense was that he was not present at 715 South Lawndale at the time the crime occurred. He stated that he did not know about the fire until several days to a week after the loss. (R. 489) Petitioner Wolf presented an alibi defense to

show that he was at the law office of Mr. Samuel Siegel on the morning of the fire. Berland did not present an alibi defense and the trial court acknowledged that there was no evidence showing Berland's presence at the scene of the fire. Berland's defense was basically one of denial and he presented testimony in an attempt to show that the building was not over insured in an effort to negate the prosecution's evidence of motive. Clearly, there was no conflict in these defenses and neither defendant sought to implicate the other. *People* v. *Somerville*, 42 Ill.2d 1, 9, 245 N.E.2d 461 (1969); *People* v. *Craig*, 47 Ill. App.3d 242, 361 N.E.2d 736 (1st Dist. 1977).[2]

The petitioner speculates that defense counsel's representation of him was hampered because of privately retained counsel's representation of the codefendant. The Illinois Supreme Court has specifically rejected creating a "conflict of interest out of mere conjecture as to what might have been shown." *People* v. *Somerville*, 42 Ill. 2d 1, 245 N.E.2d 461 (1969).[3]

In the instant case, neither Berland nor petitioner was attempting to establish his defense by implicating the other. Moreover, there was no reason to assume that petitioner would ever try to show that Berland burned the building had he been represented by different counsel or even if he had been tried separately. The evidence clearly did not show that Berland was present at the scene of the fire, as the trial judge acknowledged.

There is absolutely no reason that can be inferred from any testimony as to why petitioner would burn the building without

[2] In this brief in the Illinois Supreme Court, petitioner Wolf conceded that the defenses presented at trial *were not antagonistic*. (Brief for Defendant Wolf, at 44, Ill. Sup. Ct. Docket No. 50012)

[3] In *United States* v. *Steele*, 576 F.2d 111 (6th Cir. 1978), the sixth circuit court of appeals declined to adopt a *per se* rule under the sixth amendment requiring jointly represented defendants to be advised of their right to separate counsel in cases where, as here, joint counsel was privately retained.

Berland's consent. For petitioner to have taken such an action is out of the question. He testified that he had been friends with Berland for over thirty years. There is no evidence that they had any type of disagreement, or that Berland owed petitioner any money. Clearly, any allegation of conflict of interest is pure speculation. Their defenses did not conflict with one another.

The Illinois Supreme Court's position in *Somerville*, *supra*, of refusing to reverse a conviction because of speculation to what might have been, has been followed by a number of Federal Circuit Courts of Appeals. *United States* v. *Medel*, 592 F.2d 1305 (5th Cir. 1979); *United States* v. *Steele*, 576 F.2d 111 (6th Cir. 1978) cert. den. 99. S.Ct. 313; *United States* v. *Mandell*, 525 F.2d 671 (7th Cir. 1975) cert. den. 423 U.S. 1049; *Smith* v. *Regan*, 583 F.2d 72 (2d Cir. 1978); *United States* v. *Eaglin*, 571 F.2d 1069 (9th Cir. 1977) cert. den. 435 U.S. 406. *United States* v. *Valenzuela*, 521 F.2d 414 (8th Cir. 1975) cert. den. 424 U.S. 916 (1976).

Moreover, the petitioner's cause was advanced by counsel without sacrificing his interests in favor of the codefendant before trial, during the prosecution's case in chief, and during the defense case in chief. Counsel conducted a pre-trial investigation, filed and argued pre-trial motions, made objections to various exhibits, argued points of law, cross-examined the State's witnesses and presented a defense. The petitioner cannot and does not point to anything in the cross-examination of the State's eyewitnesses or any witnesses which would show that petitioner's interests were sacrificed in favor of the codefendant.

Additionally, during the presentation of the State's case in chief petitioner Wolf hired a second attorney. (R. 259) At the conclusion of the State's case in chief the State *nolle prossed* Count One of the indictment. When the defense presented its case the only count on which the co-defendant and the petitioner were being tried was Count Two.

The respondent submits that the instant case is precisely the type of case where a joint representation is more effective for the defendants. As the Court of Appeals said in *United States* v. *Medel, supra,* 592 F.2d 1305, 1312 (5th Cir. 1979), "when the parties' interests were so closely related, if either had suggested that the other party was guilty, then this allegation might have worked to the detriment of the accusing party." As Mr. Justice Frankfurter said in his dissent in *Glasser* v. *United States,* 315 U.S. 60, 92, 62 S.Ct. 457, 86 L.Ed. 680 (1942), quoted approvingly in *Holloway* v. *Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed2d 426 (1978), "Joint representation is a means of ensuring against reciprocal recrimination. A common defense often gives strength against a common attack." This Court in *Holloway* clearly enunciated that, "Requiring or permitting a single attorney to represent co-defendants, . . . is not *per se* violative of constitutional guarantees of effective assistance of counsel." *Holloway supra,* 435 U.S. at 482.

The Illinois Supreme Court extensively discussed both the holdings in *Glasser* v. *United States, supra,* and *Holloway, supra,* in their opinion in *Berland, supra.*

> The court has refused an invitation to require trial judges to ascertain that co-defendants' decisions to proceed with one attorney are informed (*People* v. *Somerville* (1969), 42 Ill. 2d 1,10). The crucial determination is whether there is a conflict, since absent such conflict there is no threat to a defendant's right to the assistance of separate counsel. Neither *Glasser* v. *United States,* (1942), 315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457, nor *Holloway* v. *Arkansas,* (1978), 435 U.S. 475, 55 L.Ed. 2d 426 98 S.Ct. 1173, indicate that a pretrial inquiry and waiver of separate counsel is mandated in all cases of joint representation. Because joint representation is not per se unconstitutional there is no need to require judicial inquiry until the conflict appears. The language in *Glasser* and *Holloway* that it is the duty of the trial judge to see that the trial is conducted with solicitude for the essential rights of the accused is directed specifically to trial court insistence upon joint representation where counsel or the defendant has requested separate representation. Since there was no conflict here, judicial inquiry was not required. *Berland,* at 305.

There was no objection to joint representation voiced by privately retained counsel nor by the petitioner or his codefendant in the instant case and there was no actual conflict. The facts of the instant case, therefore, do not fall within the ambit of *Holloway* v. *Arkansas, supra,* and render *Holloway* inapplicable to the case at bar. See *Thacker* v. *Bordenkircher,* 590 F.2d 640 (6th Cir. 1979).

The petitioner urges that this Court grant a writ of certiorari to determine whether it is a *per se* violation of the Sixth Amendment to permit joint representation of codefendants in the absence of an inquiry or an admonishment by the trial court. (Pet. for Cert. at 15-16) He also inquires as to what degree of prejudice must be demonstrated by a defendant to show that his Sixth Amendment rights have been violated. Neither the formulation nor the resolution of this question are allowed by the facts of this case. The petitioner cannot show, in any way, that he was prejudiced by counsel's joint representation of him and his codefendant or that an actual conflict existed.

As support for his position the petitioner relies on *United States* v. *Waldman,* 579 F.2d 649 (1st Cir. 1978) and states that *Waldman* holds that the "failure of the judge to adequately alert the defendant to the dangers of joint representation is *per se* violative of the Sixth Amendment." (Pet. at 15-16) Yet, *Waldman* does not so hold. The decision in *Waldman,* which was handed down subsequent to another First Circuit case, *United States* v. *Foster,* 469 F.2d 1 (1st Cir. 1972), cited in *Waldman,* was decided as was *Foster,* pursuant to that circuit's supervisory powers, *Waldman, supra,* at 652, rather than being founded on constitutional grounds. In a footnote (Pet. at 16) the petitioner, citing *Waldman,* and *United States* v. *Donohue,*

560 F.2d 1039 (1st Cir. 1977), quotes that portion of the opinion which deals with the type of inquiry required by the trial judge in joint representation situations in the First Circuit. The respondent notes, however, that the *Waldman* Court went on to say,

> [W]e do not think that any specifics of the form a court's inquiry concerning a defendant's waiver of separate counsel would rise to the level of a constitutional right.... [W]e view *Donahue* as merely expanding a supervisory rule,... *Waldman* at 652.

The Court affirmed Waldman's conviction.

Additionally, the First Circuit has stated that it does *not* follow a rule of *per se* reversal. *United States* v. *Foster, supra,* 469 F.2d (1st Cir. 1972). A number of the Circuit Courts of Appeal have declined to exercise their supervisory powers and implement an affirmative inquiry requirement on the trial court. *United States* v. *Mandell, supra,* 525 F.2d 671 (7th Cir. 1975) (cert. den. 423 U.S. 1049) and the cases cited therein at 676.

As the Court of Appeals said in *United States* v. *Mandell, supra,* 525 F.2d 671 (7th Cir. 1975) cert. den. 423 U.S. 1049, "the primary responsibility for the ascertainment and avoidance of conflict situations must lie with the members of the bar. Accord, *United States* v. *Paz-Sierra,* 367 F.2d 930, 932-933 (2d Cir. 1966); *United States* v. *Boudreaux,* 502 F.2d 557 (5th Cir. 1974). This Court in *Holloway* v. *Arkansas, supra,* held that "an attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." 98 S.Ct. 1173 at 1179.

For all of the above stated reasons, the respondent urges that because the Illinois Supreme Court properly decided this issue on the merits, because the decision of the Illinois Supreme

Court is in accord with the decisions of this Court, and because the petitioner has failed to show any need for this Court to grant his petition for a Writ of Certiorari, such petition should be denied.

II.

THE PROSECUTION'S DISCLOSURE OF THE IDENTITY OF THE A STATE'S WITNESS UNDER TWO DIFFERENT NAMES AT THE SAME ADDRESS COMPLIED WITH THE ILLINOIS DISCOVERY RULES AND THIS COURT'S DECISION IN *BRADY* v. *MARYLAND,* ESPECIALLY WHERE THE RECORD SHOWS THAT THE DEFENSE ALWAYS KNEW THE IDENTITY OF THE WITNESS. PETITIONER HAS FAILED TO SHOW ANY NEED FOR THIS COURT TO GRANT HIS PETITION FOR CERTIORARI.

The petitioner also prays for the granting of a writ of certiorari by this Court on the basis that the prosecution allegedly suppressed the identity of an eyewitness, Evelyn Mayberry, who was also known as Elizabeth McGowan, by causing her to be listed under both names, at the same address, in the State's answer to discovery. The petitioner claims that he did not learn of this evidence until after trial and had he known that Mayberry and McGowan were the same person he could have impeached the witness with a prior, allegedly inconsistent, statement. He also alleges that Mayberry's testimony was perjured and that the State knowingly condoned the use of this allegedly perjured testimony. In answer, the respondent maintains that a petition for a writ of certiorari is improperly brought upon this basis, for the petitioner has failed to show that the Illinois Supreme Court has decided a federal question of substance not theretofore determined by this Court or that the Illinois Supreme Court has decided such a question in a way probably not in accord with the applicable decisions of this Court. See Rule 19(1)(a) of the Supreme Court of the United

States. Although the petitioner has failed to show the need for this Court, in its sound discretion, to grant his petition, the respondent, confident that the Illinois Supreme Court has properly determined this issue will briefly address the merits.

In summary, the respondent maintains (1) that in supplying the list of witnesses to the petitioner both the Illinois Supreme Court Rules on Discovery and the dictates of *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), were complied with and no evidence was suppressed (2) that the petitioner always knew that Evelyn Mayberry and Elizabeth McGowan were the same person (3) that it was clear that petitioner did have the witness' prior statements at trial and attempted to impeach her with them at trial (4) that there was no material inconsistency in the witness' testimony (5) that another eyewitness corroborated the witness (6) and that there was absolutely no evidence of perjury on the part of the State's witnesses anywhere in the record. The Illinois Supreme Court in its opinion considered all points raised here by the petitioner and correctly resolved the issue against the petitioner.

The respondent submits that the petitioner was always aware of the fact that the witness had been listed under both names, at the same address, on the State's list of witnesses and that doing so was an unintentional act which occurred as result of the State's desire to completely comply with discovery requirements. Ill. Rev. Stat. 1973, Ch. 110A § 412. It is clear that the dual listing of the names was an act from which no harm flowed. It is also obvious that defense counsel knew about, and intended to utilize the witness' prior statements to impeach her. During the trial of the instant case, defense counsel on cross-examination, attempted to impeach Evelyn Mayberry by asking her the following question: Did you ever tell anyone that you saw a man walk in there with a mop bucket? (R. 147) The only time Mrs. Mayberry stated that she saw a man carrying a bucket was in the original police report

where, in describing the incident, she was erroneously identified as Elizabeth "McGowan" rather than as Evelyn, wife of Roosevelt McGowan. (R. C116; Pet. Post Trial Ex. No. 2)

An Illinois Bureau of Investigation report of a March 19, 1971, interview with Evelyn Mayberry was also made available to the defendant. (R. C123-4; Pet. Post-Trial Ex. No. 3) and the fact that she had been interviewed was even brought out by defense counsel during his cross-examination of her. (R. 148-149) In that report Evelyn Mayberry was identified as the common-law wife of Roosevelt McGowan. The account given by Evelyn Mayberry to the investigator for the Illinois Bureau of Investigation was substantially the same as the account given by her in the original police report where she was erroneously identified as Elizabeth rather than Evelyn. She said she saw two white male subjects enter 715 South Lawndale, one of whom was carrying an aluminum can. She then stated that she left for the store. (R. C116, 123-4, Pet. Post-Trial Exhibit Number 2)

At the civil trial in Federal District court where the fire insurance claim was litigated Evelyn Mayberry testified that she saw two men park a black station wagon in front of 715 S. Lawndale. She saw them go into the building and one of the men was carrying a can. Then she went grocery shopping. (Pet. Post-Trial Ex. No. 4 at 56-57) At that trial she identified herself as Mrs. Roosevelt McGowan, not as Elizabeth. (Pet. Post-Trial Ex. No. 4 at 55) During her testimony she said that Mr. McGowan was her husband. (Pet. Post-Trial Ex. No. 4, at 76)

In addition, Mrs. Mayberry, testifying in federal court under the name, Mrs. Roosevelt McGowan, stated on cross-examination, that on the evening of November 19, 1969, the police had brought a man in a car in front of their house to see if her husband, Roosevelt McGowan could identify him. (Pet. Post-Trial Ex. 4 at 71-73) This same information is contained in

Evelyn Mayberry's statement to the Illinois Bureau of Investigation. (R. C 124) In that statement in which she is described as being the common-law wife of Roosevelt McGowan, she states that the police came for Roosevelt McGowan. They asked him to "go out to the car with them." She did not know if he identified anyone at that time. (R. C 124)

Prior to the trial in Federal District court, Mr. Roosecelt McGowan was deposed. When he was asked what his wife's name was, he said it was *Evelyn*, (Pet. Post-Trial Ex. No. 7 at 3; R. 700) He also stated that his wife left for the store before the fire started. (Pet. Post-Trial Ex. at 14) At the trial of the instant cause she used her previous name, Evelyn Mayberry, rather than McGowan. (R. 124) Again, her story was substantially the same one she recounted on previous occasions. She saw two men drive up to the front of 715 South Lawndale. One man carried a gas can and they both entered the building. Then she left for the store. (R. 136-139)

On September 28, 1973, approximately three months prior to the instant trial, a defense investigator interviewed Evelyn Mayberry when she was in the hospital suffering from a gall bladder condition. (R. 825-826, 840-841, 861-862) This interview, made part of the record during the argument on the petitioner's post-trial motions (R. 826, 861-862), demonstrates that a defense investigator saw and spoke to Evelyn Mayberry in the hospital and made a written report of this to defense counsel. Certainly, the knowledge of the defense investigator is attributable to the defense attorney, as the knowledge of a police officer is attributable to a prosecutor. *People* v. *Marlin*, 46 Ill. 2d 565, 264 N.E. 2d 147 (1970).

In short, Evelyn Mayberry never claimed at any time to be Elizabeth McGowan. Apparently, when she and her common-law husband, Roosevelt McGowan, were first interviewed by the police her name was erroneously listed as Elizabeth rather

than Evelyn. (R. C116) The only time she used the last name of McGowan was during the civil trial in Federal District Court and then she was known as Mrs. Roosevelt McGowan, not as Elizabeth. (Pet. Post-Trial Ex. No. 4 at 55) In the other documents, which were exhibits in the instant case, she is referred to as Evelyn Mayberry, the common-law wife of Roosevelt McGowan (R. C123-4), or as McGowan's wife Evelyn (Pet. Post-Trial Ex. No. 7 at 4), not Elizabeth. Both names appearing on the list of witnesses contained the same address, 716 Lawndale.

The petitioner always possessed the federal trial transcript, knew that Mrs. McGowan was in fact Evelyn Mayberry, and could see, by examing the two transcripts that her testimony in the instant case was very similar to her testimony at the federal trial.

The Illinois Supreme Court found on the aforementioned facts that no suppression of evidence occurred in the instant case, hence, the dictates of *Brady* v. *Maryland, supra*, 373 U.S. 83, were not violated. The Illinois Supreme Court also held that in no way was petitioner deprived of any evidence material to his guilt under *United States* v. *Agurs*, 427 U.S. 97, 49 L.Ed.2d 343, 96 S.Ct. 239 (1976). *People* v. *Berland, supra*, 74 Ill.2d at 311-312. The respondent maintains that the opinion of the Illinois Supreme Court is unequivocally correct.

The petitioner also contends that the dual listing of witness Mayberry was done intentionally by the prosecution in an attempt to mislead him. There is not one iota of evidence in this record to support this contention. In fact the record supports only the opposite conclusion. When new, substitute defense counsel appeared and raised this contention during the arguments on the post-trial motion the prosecutor stated, "I ask the Court and say to the Court, that it was not done in any intentional fashion." (R. 845)

The petitioner's final accusation is that the State knowingly used perjured testimony to obtain his conviction. The respondent maintains and the Illinois Supreme Court held, that the record does not lend any credence at all to the petitioner's assertion. *Berland, supra,* 74 Ill.2d at 316. The petitioner raised this argument in the post-trial motions, on the direct appeal, in a collateral attack on the conviction (Ill. Rev. Stat. 1975, 110 § 72: (*coram nobis*) and in the subsequent appeal of the denial of the collateral attack. His arguments were repeatedly rejected by the trial court and then totally rejected again by the Illinois Supreme Court.

While Evelyn Mayberry testified at the federal insurance trial that she was unable to see the faces of the two men who exited the station wagon on the morning of the fire, she did testify that she had previously seen both of them and the vehicle. She positively identified the petitioner as the man she saw driving the station wagon on several occasions prior to the fire, specifically on the Monday before it occurred. (Pet. Post-Trial Ex. No. 4, at 58-59) She identified Defendant's Exhibit No. 12 at the federal trial, a picture of Wolf, as depicting the driver of the station wagon (Pet. Post-Trial Ex. 4 at 60), which pulled up in front of 715 South Lawndale.

At the trial of the instant case she was never asked if she had been able to see the faces of the two men. She did positively identify the petitioner as the driver of the car, who then exited the car and walked into the building with a gasoline can on the morning of the fire. It is clear that a person can be identified by his general appearance at the time of the crime. *People* v. *Oswald,* 26 Ill.2d 567, 187 N.E. 2d 685 (1963). Additionally, when Mayberry's testimony in the civil trial is examined it is substantially the same testimony she gave in the trial of the instant case. It is axiomatic that the credibility of witnesses is a matter for the trier of fact to determine. The law is also clear that "mere conflicts in the testimony of a witness

with prior statements made by him "does not establish that the witness has given perjured testimony." *People* v. *Henderson,* 36 Ill. App.3d 355, 344 N.E.2d 239 (1st Dist. 1976); accord, *People* v. *Lagios,* 39 Ill.2d 298, 235 N.E.2d 587 (1968). Clearly, any possible inconsistencies in the testimony were minor and it is clear that there is not one iota of perjury on this record.

A fact that the petitioner conveniently ignores is that Evelyn Mayberry was not the only eyewitness to identify the petitioner at the scene of the fire. Albert Kyles was also an eyewitness and he knew the petitioner having seen him on previous occasions. On the day of the fire, when petitioner was observed by Kyles, Kyles already knew who he was. Kyles' previous acquaintance with petitioner made his identification strong, positive and credible. Kyles clearly corroborated Mayberry's identification.

The prosecution obviously had no duty to point out that Mayberry's testimony was false where in fact her testimony was positive and credible. See *Napue* v. *Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). Clearly, there was no perjured testimony used to obtain the petitioner's conviction.

The decision of this Court in *United States* v. *Agurs, supra,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 343 (1976), is of no aid to the petitioner. As this Court said in *Agurs,* "The prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." 96 S.Ct., at 2399. The *Agurs* Court also held that "the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Id. at 2400.

There was no information in the instant case that was not disclosed to the petitioner, *a fortiori* there was nothing unknown which was favorable to the defendant (*Brady, supra*) or which would have affected the outcome of the trial.

For all of the above stated reasons, the respondent urges that because the Illinois Supreme Court properly decided this issue on the merits, because the decision of the Illinois Supreme Court is in accord with the decisions of this Court, and because the petitioner has failed to show any need for this Court to grant his petition for a Writ of Certiorari, such petition should be denied.

CONCLUSION

The People of the State of Illinois respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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